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In The

Supreme Court of the United States

October Term, 1995

RONALD L. RENNICK and RICHARD S. RENNICK, *pro se*,

Petitioners,

vs.

OPTION CARE, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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113 pp

QUESTIONS PRESENTED

1. Whether confusion exists among the lower courts as to the burden placed on the movant, as well as the sufficiency of the opposition by a non-movant to withstand summary judgment?

2. Whether the proceedings below resulted in a paper trial which violated Petitioners' right to a jury trial under the Seventh Amendment?

PARTIES TO THE PROCEEDINGS

Vantec Ventures Corporation, a party to the proceedings in the lower courts, is a Canadian company, formerly listed as a public company on the Alberta Stock Exchange.

HHC, Home Health Care Inc., a party to the proceedings in the lower courts, is a Canadian company and a wholly owned subsidiary of Vantec Ventures Corporation.

Home I.V. Therapy of Southern Oregon, Inc., a party to the proceedings in the lower courts, is an Oregon company and is a wholly owned subsidiary of HHC, Home Health Care Inc.

Home Infusion Care of Eugene, Inc. d/b/a O.P.T.I.O.N. Care of Eugene, a party to the proceedings in the lower courts, is an Oregon company and a wholly owned subsidiary of HHC, Home Health Care Inc.

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Ronald L. Rennick and Richard S. Rennick respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Opinion of the District Court for the Eastern District of California, dated October 23, 1992 (App. D at 42a) is not reported.

The Opinion of the District Court for the Eastern District of California, dated September 24, 1993 (App. C at 22a) is not reported.

The Opinion of the United States Court of Appeals for the Ninth Circuit (App. B at 3a) is reported at 77 F.3d 309.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 22, 1996. A Petition for Rehearing with Suggestion for Rehearing En Banc was denied on April 15, 1996 (App. A at 1a) and is not reported.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) The award of summary judgment against Petitioners implicates Petitioners' rights under the Seventh Amendment which provides as follows:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the

> right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const., amend. VII.

(2) Respondent Option Care, Inc. filed a motion for summary judgment against Petitioners Ronald L. Rennick, Richard S. Rennick and other Plaintiffs pursuant to Fed. R. Civ. P. 56 which provides in relevant part:

> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve

> opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

The Respondent Option Care, Inc. ("OCI") sells home infusion therapy franchises. At all relevant times hereto Mitch Hoggard was its President, and at times acted as its Chief Executive Officer. He was in day to day control of the business and was its primary decision maker. (Vickery Dep. E. 302). Tom Vickery was its Vice President Operations and Tom Davies was its Vice President External Affairs. Sutter Health purchased two-thirds of the OCI stock in 1984. Hoggard, Vickery and Mike Prime owned the remaining one-third.

Petitioner Ron Rennick, a medical doctor, established two OCI franchises through corporations in Medford and Eugene, Oregon, in 1986 and 1989 respectively. Petitioner, Rick Rennick, a Canadian attorney, incorporated HHC Home Health Care Inc. ("HHC") in Canada to pursue home infusion therapy interests in that country.

In 1987, Ron and Rick Rennick together began dealing with OCI to acquire exclusive rights to introduce the Option Care "system" (OCI Uniform Franchise Offering Circular, E.118) to

Canada, and acquire further franchises in the United States. OCI assisted the Rennicks in Canada, and solicited them to participate in OCI franchises that were struggling financially, and to open new franchises, in the United States.

Rick Rennick introduced Vantec Ventures Corporation ("Vantec") a Canadian public company that raised investment capital, to OCI. Through the spring of 1990, the Rennicks, OCI and Vantec negotiated towards a mutual business relationship. These negotiations culminated in a meeting in Richmond, B.C. on July 3, 1990. The Rennicks represented the Oregon franchises and HHC. Hoggard, Vickery and Davies represented OCI. Four directors and the corporate secretary represented Vantec. Andrew Dobrodzicki, a consultant, also attended.

At the meeting the parties agreed to a common venture. OCI agreed to provide to the venture exclusive use of its "system" in Canada, the rights for up to ten new franchises in the United States, and permission to take over up to ten existing franchises in the United States. The Rennicks agreed to manage the venture and contribute the Oregon franchises to it. Vantec agreed to grant equity positions to the Rennicks and OCI, to raise capital and to provide political contacts to introduce home infusion therapy to Canada. The parties agreed that this transaction would include a "reverse takeover" whereby the controlling interest of Vantec would be changed, while Vantec would become the sole parent of HHC, which in turn would become the sole parent of the Oregon franchise corporations.

At the end of the meeting Vantec director Keith Alexander proposed "that we formalize the deal by a handshake" after which "all of the principal parties got up and circulated around the room and shook hands with each other on having made the deal". (Alexander Dep. E. 680; App. F. at 52a).

OCI, HHC and Vantec signed a letter of intent dated July 20, 1990. Rick Rennick prepared the initial draft of this letter, but OCI revised it to provide that "this letter of intent is of no binding effect on any party hereto". Unbeknownst to the Petitioners, Sutter Health had in the meantime signed a letter of intent with John Kapoor concerning a sale of Sutter's two-thirds interest in OCI to Kapoor. Nevertheless, Hoggard, Vickery and Davies repeatedly assured the Rennicks and Vantec that the Richmond agreement would proceed and the parties worked towards that end. In August and early September, Ron Rennick met with Vickery, the parties exchanged information and Vantec completed a due diligence with OCI's authorization.

The Kapoor purchase was finalized in September, 1990. The next day Vickery and Davies contacted Rick Rennick with further instructions for completion of the Richmond agreement. Davies stated that Rick Rennick should report to the Vantec board accordingly. (S.R.I. E.1139-40;App. G at 64a).

At the OCI annual meeting in October, 1990, the Rennicks, Hoggard, Vickery and Davies reviewed a form of reverse takeover agreement prepared by Vantec, after which Hoggard again confirmed to the Rennicks that OCI would proceed with the Richmond agreement. Thereafter, Vickery also confirmed separately to two Vantec directors and Hoggard confirmed to Dobrodzicki that the Richmond agreement would be completed.

In the ensuing weeks, the parties completed numerous steps pursuant to the Richmond agreement. For example, the Rennicks and Dobrodzicki attended at OCI's headquarters and briefed OCI's operational people on the implementation of the deal; Dobrodzicki completed a comprehensive proposal for implementation of home infusion care in Alberta, which OCI reviewed and approved; OCI introduced Vantec to prospective franchisees as takeover targets, and Vantec undertook takeover

negotiations; OCI prepared and processed franchise transfer documents; Vantec completed private placement financing; obtained regulatory approvals and made public announcements; Vantec and the Rennicks made banking arrangements and signed guarantees to OCI and a bank; and Vantec funded the operations of the Oregon franchises, with resultant payments being made to OCI. The closing date for the reverse takeover was December 12, 1990, and the final paperwork was completed on January 23, 1991. (Consent to Transfer Franchises E.101).

In February, 1991, Kapoor bought Hoggard's and Vickery's stock in OCI, and Hoggard resigned. Thereafter, Kapoor advised Vantec "we have no deal". Until that time OCI had not advised anyone that it did not intend to proceed with the Richmond agreement. (Matson Dep. E. 889; Hoggard Dep. E. 368). On hearing this, Hoggard stated that his reaction was "shock" and Vickery stated that he was "astounded", "shocked" and "speechless" and that "it sickened me".

After Hoggard's departure, disputes arose and this litigation followed. The Petitioners and other plaintiffs brought claims for breach of contract, violations of California Franchise Investment Law, breach of the covenant of good faith and fair dealing, breach of fiduciary duty and promissory estoppel. They claimed for recovery of expenses of 1.7 million dollars, (Heiden Report E. 132), plus damages. OCI brought numerous motions. After denying an OCI Motion for Summary Judgment on the grounds that the "Plaintiffs raise a genuine issue of material fact regarding whether the parties mutually intended to be bound by the terms negotiated prior to the letter of intent." (E. 1188-89; App. D at 42a), the District Court reversed its earlier position and granted summary judgment pursuant to a Motion To Reconsider. On appeal, the Ninth Circuit affirmed the summary judgment. A Petition For Rehearing was denied.

REASONS FOR GRANTING THE WRIT

I.

CONFUSION EXISTS AMONG THE LOWER COURTS AS TO THE BURDEN PLACED ON THE MOVANT, AS WELL AS THE SUFFICIENCY OF THE OPPOSITION BY A NON-MOVANT TO WITHSTAND SUMMARY JUDGMENT.

In 1986, this Court rendered three decisions, collectively known as the "trilogy"[1] regarding Fed. R. Civ. P. 56. Confusion and uncertainty have characterized the ensuing application of the summary judgment principles set out therein. Many commentators are critical. Schwarzer, Hirsch and Barrans state "Disparities in judicial attitudes have contributed to widely differing interpretations and applications, resulting in much confusion over the proper use of summary judgment procedure".[2] Schwarzer and Hirsch further state "there are few clear and firm guidelines for its use".[3] Duane comments "our law governing summary judgment is in a state of profound disarray and incoherence"[4] and Gordillo concludes, "Currently, trial

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1. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986).

2. William Schwarzer, Allen Hirsch and David Barrans, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 445 (1992).

3. William Schwarzer and Allen Hirsch, *Summary Judgment After Eastman Kodak*, 45 Hastings L.J. 1, 20 (1993).

4. James Duane, *The Four Greatest Myths About Summary Judgment*, 52 Wash. and Lee L. Rev. 1523, 1576 (1995).

court judges struggle with an impractical standard. . .".[5] The growing critical commentary on the subject evidences its importance.[6]

The finality of summary judgment, with its resultant exclusion of access to a jury trial, demands uniform application of legal principles. Disparate justice in this context automatically results in encroachment on constitutional rights. The existing widespread confusion on these issues, renders them particularly appropriate for review by this Court. *See generally Hickman v. Taylor,* 329 U.S. 495 (1946); *Hanna v. Plumer,* 380 U.S. 460 (1965).

A. The Divergent Approaches That Courts Have Utilized In Summary Judgment Cases Demonstrate Their Confusion.

To predict how courts will treat any application for summary judgment is difficult because of the divergent ways in which the lower Courts have dealt with the trilogy. "The different circuit courts have viewed the standards for summary judgment. . . and the trilogy differently. Some appear more disposed to upholding summary judgments while others seem more disposed to leaving

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5. Gregory Gordillo, *Summary Judgment and Problems in Applying the Celotex Trilogy Standard,* 42 Clev. St. L. Rev. 263, 298 (1994).

6. *See also, generally,* Brian L. Weakland, *Summary Judgment in Federal Practice: Super Motion v. Classic Model of Epistemic Coherence,* 94 Dickinson L. Rev. 25 (1989); Steven Alan Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court,* 116 F.R.D. 183 (1987); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process,* 49 Ohio St. L.J. 95 (1988); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases,* 34 B.C.L. Rev. 203 (1993); Marcy J. Levine, *Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court,* 37 Emory L.J. 171 (1988).

any possible factual disputes to the jury."[7] Some of this confusion results from the very nature of the trilogy itself. One commentator has summarized the weight and the varying focuses of the trilogy as follows:

> the Court gave district judges enough precedential ammunition to shoot down cases by summary judgment and keep them down. First, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* allows Courts to require that claimants present more persuasive evidence to defeat summary judgment when the context renders the claim implausible. Next, *Celotex Corp. v. Catrett* places the burden of showing the existence of a genuine issue of material fact on the non-moving party, while the moving party need only assert the basis of its motion. Finally, *Anderson v. Liberty Lobby, Inc.* requires the non-moving party to present enough evidence at the summary judgment stage not only to show a *prima facie* case, but to meet its burden of persuasion as well. Together, these three cases represent the dramatic shift toward more liberal use of summary judgment.[8]

Others have noted that more definitive guidelines could have been included in the trilogy, but were not.[9]

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7. Frank Cavaliere, *The Recent "Respectability" of Summary Judgments and Directed Verdicts*, 41 Clev. St. L. Rev. 103, 144 (1993).

8. Weakland, *supra*, at 31-32 (footnotes omitted).

9. Stempel, *supra* at 157.

The result of the varying focuses of the trilogy cases is that lower courts have adopted correspondingly varying approaches to summary judgment motions. Rather than settle this area of the law over time, the latitude of the trilogy has fostered increased divergencies in application of summary judgment principles. As a result, a summary judgment outcome may vary dramatically from jurisdiction to jurisdiction on an identical suit.[10]

Inconsistent application of summary judgment standards among and within the federal courts is readily apparent, but difficult to reconcile. This confusing context creates an opportunity for individual courts to make decisions *ad hoc*, without reference to any particular view of the trilogy, with little or no explanation of the facts, and at times in conflict with the decisions of this Court.[11] Obviously, uncertainty or misuse in summary judgment in this environment may have serious constitutional ramifications.

1. Some courts appear to be applying pre-trilogy summary judgment standards.

Examples of resistance to the trilogy can be seen in the Eleventh, Fifth and Third Circuits, where pre-trilogy standards remain prominent.

In *Clark v. Coats and Clark, Inc.* 929 F.2d 604 (11th Cir. 1991), in reversing a wrongful termination award, the Eleventh Circuit emphasized that the leading pre-trilogy case, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), remains the general rule. That is, the movant must affirmatively foreclose the possibility that an essential element of the non-movant's claim has

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10. Weakland, *supra* at 46-51.

11. *See* section I.A.3 of this Petition, *infra* at 14.

occurred. The court stated that *Celotex, supra,* n.1, applied only in the unusual situation where neither party could affirmatively disprove or prove the existence of a material fact.

Commentators have differed in their views on *Clark.*[12] However, other courts in the Eleventh Circuit and lower courts have followed *Clark.*[13]

The Fifth Circuit seems willing to follow the Eleventh Circuit. In 1993, in *Ashe v. Corley,* 992 F.2d 540 (5th Cir. 1993) the Fifth Circuit quotes with approval *Commander v. BASF Wyandotte Corp.,* 978 F.2d 924, 926 n.4 (5th Cir. 1992) "Before the non-moving party is required to produce evidence in opposition to a motion for summary judgment, the moving party in a motion for summary judgment must demonstrate that there are no factual issues warranting trial", which follows *Clark supra,* at 608. In *Ashe, supra,* the court purports to follow the earlier Fifth Circuit decision in *Russ v. International Paper Co.,* 943 F.2d 589, 591 (5th Cir. 1991) where it stated that summary judgment in the Fifth Circuit mirrors the Eleventh Circuit. As will be noted later, however, it appears that in *Russ* the Fifth Circuit actually employed a *Matsushita* style analysis, following *Leonard v. Dixie Well Serv. & Supply, Inc.,* 828 F.2d 291 (5th Cir. 1987). It may be that in *Ashe,* therefore, the Fifth Circuit is signalling a shift away from summary judgment.

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12. *See generally* James V. Chin, *Clark v. Coats and Clark: The Eleventh Circuit Clarifies the Initial Burden in a Motion for Summary Judgment,* 26 Ga. L.Rev. 1009 (1992) who praises the Court for clarifying the standards and Schwarzer, Hirsch and Barrans, *supra,* who are critical.

13. *See, e.g., Thompson v. Metropolitan Multi List,* 934 F.2d 1566, 1583 (11th Cir. 1991); *Sammons v. Taylor,* 967 F.2d 1533, 1538 (11th Cir. 1992); *Chikorski v. Ortho Pharmaceutical Corp.,* 832 F. Supp. 341, 343 (S.D. Fla. 1993); *Freeman v. United Cities Propane Gas of Georgia,* 807 F. Supp. 1533, 1537 (M.D. Ga. 1992).

The Third Circuit joins the Eleventh and Fifth Circuits in their reluctant approach to granting summary judgment. *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995), prescribes a high threshold for a movant to overcome when it states "In determining whether a genuine issue of fact exists, we resolve all reasonable doubts in favor of the non-moving party". *Id.* 493. The Third Circuit has been consistent in its rather strict approach in requiring that the non-movant "is to be believed" citing Justice White in *Anderson*, 477 U.S. 242, at 255 (1986) as setting down the applicable principle, *Tabas v. Tabas*, 47 F.3d 1280, 1287 (3d Cir. En Banc 1995), and in stating that the nonmoving party is to be given the benefit of all reasonable inferences from the record. *Michael v. Shiley Inc.*, 46 F.3d 1316, 1321 (3d Cir. 1995) and s*ee Gray v. York Newspapers Inc.*, 957 F.2d 1070, 1078 (3d Cir. 1992).

Weakland concludes that "In the Third Circuit the burden remains with the movant on summary judgment", particularly in employment discrimination cases.[14] He notes, however, that the First Circuit differs, citing *Dea v. Look*, 810 F.2d 12 (1st Cir. 1987). The distinction he draws between the Circuits on this issue may be subtle, but these cases make it clear that out comes of two identical cases would differ in the Third and First Circuits.

2. Some Courts appear to apply a Matsushita-style approach to summary judgment.

One divergent stream of post-trilogy summary judgment application can be seen in the Fifth, Sixth and Ninth Circuits. Many courts in these circuits have focused on the plausibility aspects of *Matsushita, supra*, n.1, in conjunction with the principles enunciated by Justice White in *Anderson, supra*, n.1

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14. "*Weakland, supra* at 46."

that "the evidence of the non-movant is to be believed and all justifiable inferences drawn in his favor" *id.* at 216.

In 1987, reversing a grant of summary judgment, in *Leonard v. Dixie Well Service & Supply Inc., supra,* the Fifth Circuit held that a district judge erred in finding a defendant employer's detailed records more reliable or inherently accurate than a plaintiff's recollection. The court held that the nonmoving party's evidence "is to be believed" and that on summary judgment the court is not to make credibility decisions. *Id.* at 294.[15]

In *Russ v. International Paper Co., supra,* the Fifth Circuit affirmed the award of summary judgment to a defendant because the plaintiff's proffer was a single equivocal affidavit that was not valid Rule 56(e) evidence. Focusing on the facts that the affidavit presented by the plaintiffs as to causation was ambiguous and did not prove the affiant's competency to testify as an expert, the court dispensed with the affidavit and was left with allegations and circumstantial evidence only. This appears to be a *Matsushita* style approach even though the Court stated that summary judgment law in the Fifth Circuit mirrors the Eleventh Circuit, with its pre-trilogy leanings. *Id.* at 591.

In 1994 in *Adams v. Metiva,* 31 F.3d 375 at 382 (6th Cir. 1994) the Sixth Circuit reversed a summary judgment and stated, "the trial court may only inquire into the plausibility of circumstantial evidence, and that when the non-moving party presents direct evidence refuting the moving party's motion for summary judgment, the Court must accept that evidence as true". *Id.* 382. The court specifically approved the Ninth Circuit's conclusion in *McLaughlin v. Liu,* 849 F.2d 1205 (9th Cir. 1988)

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15. This is clearly a different approach than was taken by the same Circuit in *Ashe v. Corley, supra.*

that the Supreme Court in *Matsushita* authorized ". . . an inquiry on summary judgment into the 'implausibility' of inferences from circumstantial evidence . . . not an inquiry into the credibility of direct evidence". *Id.* at 1207. These findings seem to follow logically from the Sixth Circuit's leading case on summary judgment, *Street v. J. C. Bradford*, 886 F.2d 1472, 1480 n.21 (6th Cir. 1989).

In *McLaughlin*, on appeal, the movant argued that summary judgment had been properly granted because the respondent's affidavit in opposition to summary judgment was implausible, but the Ninth Circuit rejected this argument holding that Matsushita's implausibility analysis did not apply in cases of direct evidence, at 1208. *See also Bator v. State of Hawaii*, 39 F.2d 1021, 1026 (9th Cir. 1994); *Denton v. Hernandez*, 112 S. Ct. 1728, 1733 (1992); *T.W. Electric Serv. v. Pacific Elec. Contractors*, 809 F.2d 626, 630-32 (9th Cir. 1987). The Third Circuit has also adopted this approach on occasion. *See, e.g., Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1338 (3d Cir. 1987).

It would appear that many Courts in the Fifth, Sixth and Ninth Circuits, and some in the Third Circuit, have taken the meaning of *Anderson* to be that *Matsushita* should be limited to cases where inferences must be drawn from circumstantial evidence. "Only in this way, it is generally thought can *Matsushita* be reconciled with the teachings of *Anderson* and the constitutionally protected province of the jury." Duane, *supra* at 1570.

3. Some courts provide little or no indication of the summary judgment standards they have followed.

In contrast to the cases discussed above, many courts provide little or no explanation as to their basis for summary

judgment decisions. Schwarzer, Hirsch & Barrans (1992), *supra* at 455. comment that once a decision is made, a Court ". . . may have little interest in spelling out its analysis so as to provide guidance and promote coherence in summary judgment law." Examples of this can be seen in *Clark v. Coats & Clark, supra* at 608, *Ashe & Corley, supra* at 543 and *Philadelphia Gear Corp. v. Gear de Mexico S.A.*, 44 F.3d 187 (3d Cir. 1994).

In the case at bar, the Ninth Circuit gives no indication of the approach it took, although it may have performed a *Matsushita* style analysis. If that is the case, however, it used a much more stringent approach than would appear to be common in the Fifth and Sixth Circuits, and with other panels in the Ninth Circuit. Here, the Ninth Circuit dismissed or discounted sworn testimony in favor of the Petitioners based upon personal knowledge of pivotal facts.[16] There is no way to tell why the court selected certain evidence and ignored whole sections of other evidence. The court chose among inferences and failed to resolve ambiguities in the nonmovant's favor.

An explanation of why courts are unwilling to articulate the summary judgment principles they apply is set out in *Gordillo's* analysis, *supra* at 286-289. He makes a strong case that current summary judgment dynamics require judges to exercise discretion in weighing evidence and choosing inferences, while having to maintain an appearance of neutrality in purported compliance with the principles of the trilogy. He concludes that as a result, however, ". . . . current summary judgment doctrine threatens the integrity of the judicial process", *id.* at 282, and ". . . this attempt to treat summary judgment as a completely neutral device results in great confusion" *id.* at 286.

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16. *See* part II *infra* for discussion of direct evidence and see Appendices.

B. The Fact That Courts Provide Little Or No Explanation Of Summary Judgment Decisions Shows Confusion And Fosters Uneven Application.

Aside from specific case examples, studies tend to show that the Courts are often silent as to the standards they apply to summary judgments. For example, experts have gathered data which discloses that, where cross-summary judgment motions were not involved, 60% of all district courts' granting summary judgment in the first quarter of 1988 failed to discuss the sufficiency of the non-movant defendant's proffer.[17] This silence makes it difficult for appellate courts to redress errors and confusion in the application of the law.

Such silence on the part of the lower courts may also indicate several things. Firstly, judges may have taken the trilogy message as an unrestrained invitation to clear their dockets in derogation of the Seventh Amendment. Risinger suggests that this ". . . perceived exhortation for more summary judgments, is bound to lead to many summary judgments improvidently granted" because judges may have mispredicted what the record would have been at trial. "And it bears repeating that each time this happens there is not merely an error, but an error of constitutional dimension."[18]

Further, the silence may indicate that the courts are uncertain as to the application of the standards. Unable to reconcile the "seemingly impossible standard for determining

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17. Issacharoff and Loewenstein, *supra* at 92.

18. Michael Risinger, *Another Step in the Counter Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 Brook. L. Rev. 35, 42 (1988).

the existence of a genuine issue of material fact", Gordillo, *supra* at 281, the courts remain quiet as to how they reached their decisions so as not to be seen in conflict with the trilogy and therefore subject to reversal. While not as insidious as court's viewing the trilogy as a ready opportunity for docket control, this uncertainty also causes grave constitutional errors.

This silence may also suggest that the courts are making quasi-political decisions as to the types of cases which they want to go to trial, *see Stempel, supra* at 161, but the Seventh Amendment right to trial should be available equally to all litigants.

Finally, when the courts do address the standards, they "generally intone that under any measure of quality or quantity the claimant's evidence fails to rise to the required level of proof". *Weakland, supra* at 26. The evidence in these cases may "consist of self-serving affidavits, selected incontroverted documents, bits and snatches of deposition transcripts, and similar items" and "the dramatic adversarial clash of the parties may be reduced to a series of cold affidavits, the comparison of which may not produce what the judge considers to be a significant controversy." *Id.* at 27. This combination of trial by paper and lack of articulated guidelines, for either district courts to follow or for appellate review, makes confusion in the summary judgment field particularly dangerous.

Again, the case at bar manifests this problem. The Ninth Circuit gives no indication of why the sworn testimony of eight witnesses for the non-movant, and the sworn admissions of three witnesses for the movant, and other evidence proffered in opposition, was deficient. The apparent failure of the Ninth Circuit to recognize the existence of such evidence suggests that the court merely restricted the evidence it considered to avoid the appearance that it did not wish to follow the principles of the

trilogy. It is the current summary judgment environment of uncertainty and confusion that allows courts to do this.

II.

THE PROCEEDINGS BELOW RESULTED IN A PAPER TRIAL WHICH VIOLATED PETITIONERS' RIGHT TO A JURY TRIAL UNDER THE SEVENTH AMENDMENT.

In his dissent in *Anderson*, Justice Brennan said, "I am fearful that this new rule — for this surely would be a brand new procedure — will transform what is meant to provide an expedited 'summary judgment' procedure into a full blown paper trial on the merits." *Anderson, supra* at 266-267. Numerous commentators have concluded that the result Justice Brennan feared has in many courts become a reality.[19]

In practice, the non-movant plaintiff is now increasingly forced to prove his case at summary judgment phase, and the courts are increasingly drawing inferences in the movant defendant's favor, weighing evidence and deciding issues of credibility.[20] This approach, which sees the "boilerplate"[21] application of summary judgment as a favored remedy[22] has

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19. For example, *see Weakland, supra* at 58; *Stempel, supra* at 178.

20. Ann C. McGinley, *supra*, 237-41; *see also* Gordillo, *supra* at 281-82.

21. Marcy J. Levine, *supra* at 214.

22. *Id.* 214-15; *see also*, Samuel Issacharoff and George Loewenstein, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73, 73-74 (1990); Weakland, *supra* at 30; Risinger, *supra* at 42.

profound dangers. Not only does the focus on documentary evidence exclude from the court the critical aspect of witness demeanour, but it also results in lack of incentive to settle cases[23] and wealth transfer from plaintiffs to defendants.[24] By increasing anticipated costs, the favored status of summary judgment also discourages a broad spectrum of plaintiffs from entering into or being able to survive in the litigation arena. "[S]ummary judgment fundamentally alters the balance of power between plaintiffs and defendants by raising both the costs and risks to plaintiffs in the pretrial phases of litigation while diminishing both for the defendants."[25] The willingness of the courts to dispose of matters at summary judgment level, coupled with the procedural advantages given to movant defendants[26] fosters the bringing of multiple applications by defendants[27] and allows for the issues, and the Seventh Amendment right to trial, to often be lost or minimized. The sheer volume of paper in many applications creates a difficult context where the lower court is required to in effect weigh evidence and make credibility decisions,[28] contrary to the very essence of this court's summary judgment doctrine as set out in the trilogy.

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23. Issacharoff and Loewenstein, *supra* at 100-03.

24. *Id.* at 103-04; *see also,* Risinger, *supra* at 35; Gordillo, *supra* at 277-82.

25. Issacharoff and Loewenstein, *supra* at 75, 105-07.

26. Issacharoff and Loewenstein, *supra* at 83-87, 92-94, 110-11; *see also* Risinger, *supra* at 39-42; Stempel, *supra* at 172; Weakland, *supra* at 25-27.

27. Issacharoff and Loewenstein, *supra* at 114.

28. Gordillo, *supra* at 286-289.

A. The Ninth Circuit Failed To Follow the Fundamental Principles Of The Trilogy In Derogation Of The Rights Of The Petitioners To A Jury Trial.

In *Anderson v. Liberty Lobby, Inc.*, Justice White stated:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor.

Anderson, supra at 255.[29]

Schwarzer, Hirsch and Barrans state that this passage ". . . is an unambiguous and conventional statement of the judge's function in dealing with a summary judgment motion. It should present no difficulty for judges confronted with a dispute over historical facts."[30]

In the case at bar, however, the Ninth Circuit refused to treat

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29. One commentator has recently determined that the proposition that the nonmovant's evidence "is to be believed" from *Anderson* has been cited repeatedly by and followed in this Court in judgments joined by 13 different Justices, that it has been cited more than 100 times by United States Courts of Appeal, including virtually every circuit in 1995, as well as enumerable lower courts and leading reference works on summary judgment and civil procedure. He states, "It is now about as 'well settled' as anything ever written about summary judgment". Duane, *supra* n. 155 and at 1564-65.

30. Schwarzer, Hirsch and Barrans, *supra* (1992) at 487.

much of the Petitioners' evidence as believed and drew inferences in favor of the movant-defendant. The court disregarded deposition testimony and sworn responses to interrogatories that showed by direct evidence both the making of an agreement and the continued existence of that agreement.

The court disregarded totally the sworn testimony of eight Petitioners' witnesses present when the parties made the agreement. For example, Vantec Director Bill Sturgeon testified as to the basic terms of the deal and concluded, "When I left the meeting my impression was that the deal had been made when we shook hands and agreed that we had a deal." (Sturgeon Dep. E.725-26, App. F at 63a, for examples of other sworn testimony *see* McDonald Dep. E.804, App. F at 63a; Rick Rennick Dep. E.424, 544, App. F at 58a and 59a). As to the testimony of Keith Alexander, the only witness whose evidence is noted by the Ninth Circuit, an inference is drawn against the Petitioners from the fact of a "handshake", overlooking the plain statement by Alexander that he proposed that the parties "formalize" the deal by a handshake. (Alexander Dep. E.680, App. F at 62a).[31]

Perhaps as important, the Respondent's C.E.O. Hoggard admitted an intention to be bound. With regard to the July 20, 1990 letter of intent he testified, "Yes" when asked, "Did you intend for Option Care to be bound by the materials of this document when you signed it?" (Hoggard Dep. E.582, App. F at 54a). Further, Hoggard and Respondent's Vice President Davies confirmed that the Respondent had obligations flowing from the letter (Hoggard Dep. E.360, App. F at 54a; Davies Dep. E.864,

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31. Of note, at page 1728 of its Judgment (App.B at 7a), the Ninth Circuit states that, "Oddly, no other deposition testimony is cited regarding this handshaking. " This is a clear misreading of the record, where other deposition evidence as to the handshaking is cited. Example, Sturgeon Dep. E.726, 743 and Alexander Dep. E.703, 722.

App. F at 56a and 57a) and Davies stated that it was not an "agreement to agree". (Davies Dep. E.866; App. F at 57a).

The Ninth Circuit interpreted the words, "this letter shall be of no binding effect" and references to future agreements within the July 20, 1990 letter of intent (App. E at 51a) to mean that nothing in the entire course of dealings of the parties could result in a binding agreement.[32] This finding, however, disregards Hoggard's testimony which explains that the Kapoor offer to purchase Sutter Health's stock in the Respondent required that the Respondent not go forward with any outside matters until the Kapoor purchase was finalized (Hoggard Dep. E.364; App. F at 54) and record evidence that the Richmond agreement between Vantec and the Respondent did go forward immediately after the Kapoor purchase was completed (SRI E.1139; App. G at 66a) This finding also disregards that the relationships of the parties contemplated the signing of future agreements with required terms [*i.e.* franchise agreements (E.124), software agreements (E.120) and guarantees (E.111), all of which had predetermined standard terms under the Respondent's Uniform Franchise Offering Circular (E.118)].

The Ninth Circuit also disregarded or treated as immaterial evidence showing the Respondent repeatedly confirmed the existence of a contract and assured the Petitioners that the Respondent would abide by it. For example, on July 19 and 20, 1990, Hoggard stated, "we are going to go ahead. We are going to do our deal." (Rick Rennick Dep. E.491; App. F at 60a; SRI 1079). In August, 1990, Vickery confirmed that the Respondent intended "to proceed with the franchise acquisition and

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32. It should be noted that in his decision of October 23, 1992, Judge Burrell in the District Court found that the explicit language of the letter of intent is not necessarily inconsistent with a pre-existing oral contract. (App. D at 43a).

development plan agreed to by the Plaintiffs in Richmond, B.C." (SRI E.1138; App. G. at 65a) Upon receipt of the Interim Operating Agreement drafted by Rick Rennick, Vickery stated, "Don't worry. Everything is fine and it will all go ahead." (Rick Rennick Dep. E.506; App. F at 60a).

In September, 1990, Vickery confirmed that Dobrodzicki "should proceed with the inspection of these franchised businesses on behalf of Vantec in furtherance of the agreement" (SRI E.1081) and Vickery and Davies advised that "they had been instructed to proceed pursuant to the agreement with the parties." (SRI E.1139; App. G at 66a). Davies stated that "Rick Rennick should report to the Vantec Board" that: the Respondent had authorized the release of proprietary and confidential information, the Respondent's operational people had assembled to review the agreement, the Respondent wanted a meeting, to include its operational people, to review the implementation of the agreement, and the Respondent wished to institute a structured program pursuant to the agreement. (SRI E.1139-40; App. G. at 66a).

On October 5, 1990, after reviewing the "reverse takeover agreement" prepared by Vantec, Hoggard stated that "OCI would honor its agreement with the Plaintiffs." (SRI E.1141) On October 9 and 10, 1990, Vickery confirmed to Keith Alexander that the Respondent "had an agreement with the Plaintiffs" and confirmed to Bill Sturgeon that the Respondent "intended to proceed with its agreement with the Plaintiffs." (SRI E.1083, 1142; App. G. at 68a).

In November, 1990, Vickery stated: "the relationship between the parties would proceed as previously discussed and agreed and that the Plaintiffs should proceed to close the transaction contemplated in the share exchange [reverse takeover] agreement." (SRI E.1143; App. G at 69a). Hoggard

stated that Kapoor had agreed to allow him to "conclude the details of his business development plans, including the arrangements with the Plaintiffs." (SRI E.1144) Further assurances were given by Hoggard and Vickery in response to the Plaintiffs' inquiries regarding banking commitments and because of the significant investment of money: "the various written agreements described in the letter of intent and otherwise would be executed and honored by OCI." (SRI E.1085, 1089).

The Ninth Circuit found that the changes which the Petitioners made in their positions in reliance upon the existence of a contract were unreasonable as a matter of law in light of the non-binding language in the letter of intent (App. B at 19a). The Ninth Circuit, however, does not take into account that the Respondent was aware of the actions being taken by the Petitioners and others in changing their positions, that the Respondent instructed and encouraged the Petitioners and others to do so (*see generally* SRI E.1137-46; App. G at 65a-71a), and that the Respondent itself took steps in performance of the Richmond agreement. When asked "Now, after the Las Vegas conference on October 5 or 6, you having told them [the Rennicks] that it was the Option Care intention to go forward with the transaction as set out in the letter of intent between Vantec and Option Care, what, if anything, did Option Care officials do to effectuate that transaction?" (emphasis added). Hoggard replied, "I believe the reverse takeover was approved, but I don't recall the date." (Hoggard Dep. E.376 ; App. F at 55a).

Moreover, with full knowledge of what the Petitioners and others were doing, the Respondent did not tell the Petitioners or others that the Respondent did not intend to proceed with the Richmond agreement. (Hoggard Dep. E.368; App. F at 54a-55a, and Matson Dep. E.889; App. F at 56a).

The reactions of Hoggard and Vickery, after they had sold their shares to Kapoor, upon being told that Kapoor had stated that there was no agreement with the Petitioners, should have allowed for the drawing of strong inferences to support the existence of a contract. Hoggard testified that his reaction was "shock". (Hoggard Dep. E.377; App. F. at 55a-56a). Vickery stated that he was "astounded", "shocked" and "speechless" that the Respondent had not proceeded with the agreement reached with the plaintiffs and that it "sickened me". (Vickery Dep. E.314; App. F. at 52a-53a). When Vickery was questioned, "Have you ever offered an opinion to anyone that the Rennicks were not treated fairly by OCI?", he stated, "Probably to Bob Sullivan when I asked him why they weren't moving ahead. . . . I said listen, that's not fair." (Vickery Dep. E.317; App. F. at 53a).

There is no evidence to show that the Petitioners had any knowledge of limits to Hoggard's authority. On the contrary, there is direct evidence that Hoggard held himself out as having authority (Sturgeon Dep. E.726, App. F. at 63a; Rick Rennick Dep. E.429, App. F. at 59a) and, after taking over the company, Kapoor declared publically, and confirmed personally to Ron Rennick that Hoggard ran the company. (Vickery Dep. E.313, App. F. at 52a; Ron Rennick Dep. E.917, App. F. at 61a).

In 1992, this Court clarified *Matsushita* by stating that "*Matsushita* demands *only that the non-moving party's inferences be reasonable* in order to reach the jury, a requirement that was not invented, but merely articulated in that decision." *Kodak v. Image Technical Serv.*[33] In *United States v. Diebold, Inc.*, this Court stated that "On summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion."[34]

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33. 504 U.S. 451, 468 (1992) (emphasis added) citing *Matsushita*, 475 U.S. at 574 (citations omitted).

34. 369 U.S. 654, 655 (1962).

Contrary to this Court, the Ninth Circuit wholly disregarded the above sworn evidence from the Petitioners' and Respondent's officials, and found that the Petitioners' reliance was unreasonable as a matter of law due to the non-binding reference in the letter of intent. In addition to extending the meaning of the words "this *letter* shall be of no binding effect" to mean that all of the dealings with the parties could not result in agreement, the Ninth Circuit goes to some lengths to justify an inference from the "handshake evidence" that is in a light most favorable to the Respondent, and contrary to the interests of the Petitioners. In so doing, the Court unduly encroached upon the Petitioners' rights under the Seventh Amendment to have a jury act as a fact finder. Clearly, the Petitioners were entitled to the inference from the handshake testimony and the other dealings of the parties throughout that the Respondent had made an agreement, had confirmed the agreement, had assured the Petitioners that it would perform under the agreement, and in fact did partially perform. "[T]he drawing of legitimate inferences from the facts are jury functions."[35]

B. The Case Below Turned On Issues Of Witness Credibility And Therefore Should Have Reached A Jury.

By failing to view inferences allowed by the evidence in the light most favorable to the Petitioners and by treating as nonexistent evidence of factual disputes, when in fact those issues were outcome determinative, the Ninth Circuit violated the Petitioners' right to a jury trial and to have a jury decide the facts of the case. As one commentator has said: "Since direct evidence concerning a historical fact therefore hinges on the witnesses' credibility and cognitive abilities, a true conflict

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35. *Kozup v. Georgetown University*, 851 F.2d 437, 439 (D.C. Cir. 1988).

concerning such evidence is exclusively within the province of the jury and may not be removed from its consideration by the judge without violating the Seventh Amendment."[36]

The historical facts at issue in the case at bar are essentially this: (1) did the parties make an agreement in Richmond, B.C.? and, (2) did the Chief Executive Officer and other officers of the Respondent, particularly after the signing of the letter of intent, assure the Petitioners that the agreement would be performed? and (3) what acts did the parties do consistent with the existence of an agreement, and whether any such acts were in part performance of the agreement?

The testimony of the Petitioners and their witnesses concerning the formation of an agreement and what was said and done by the parties is absolutely essential. These issues revolve around witness credibility because, among other things, (a) the Petitioners and their witnesses have sworn to the making of an agreement, and the particulars thereof; and (b) the Respondent's C.E.O. has confirmed under oath that the Respondent intended to be bound; and (c) the Petitioners and their witnesses have sworn to specific assurances by the Respondent's authorized officers that the contract would be observed and performed by the Respondent; and d) the Respondent's C.E.O. of the time has confirmed under oath that the Respondent acted to effectuate the agreement; and e) there is evidence to support that the C.E.O. of the Respondent acted with binding authority both before and after the Kapoor purchase, in providing assurances and in an act of part performance that should create an estoppel.

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36. Daniel P. Collins, *Summary Judgment and Circumstantial Evidence*, 40 Stan. L.Rev. 491, 494 (citing *Colby v. Klune*, 178 F.2d 872, 873 (2d Cir. 1949); *Hampton v. Hanrahan*, 600 F.2d 600, 625 (7th Cir. 1979) (directed verdict case), *rev'd in part on other grounds*, 446 U.S. 754 (1980); *Carter v. DuncanHuggins, Ltd.*, 727 F.2d 1225, 1234 (D.C. Cir. 1984) (j.n.o.v. case)).

Based upon the dealings of the parties, including oral communications confirming an intention to be bound and to perform the contract, and the creation of documents, such as development documents, franchise transfers, and financial guarantees, given by the Petitioners to the Respondent, a jury could reasonably find that the Respondent had made an agreement with the Petitioners, had repeatedly assured the Petitioners that it would proceed with the agreement, and in fact had performed part of the agreement.

To the extent that the Ninth Circuit considered the Petitioners' claim implausible (i.e., to make no economic sense: *Matsushita, supra* at 587) the record shows otherwise. For example: Respondent was to provide a proprietary "system", Vantec a public vehicle with access to capital and a powerful board, and the Rennicks had years of experience in the "system", administrative resources and a Canadian-United States presence; Rick Rennick, Dep. E.552; Respondent needed Canadians, Vickery Dep. E.312, and Rennicks had a long course of dealings with Respondent and could provide financial and personal resources which Respondent lacked, Rick Rennick Dep. E.555-56. "The Vantec board members [had] been leaders with the [Canadian] government with respect to health care services" and Hoggard advised the Respondent's board "[t]his appears to be a very viable method for entering the Canadian market" and "right now things are occurring at a very fast pace and it would behoove us to move rather swiftly . . . to enter into an agreement before the next [Respondent's] board meeting", Respondents Board Minutes, E.033, Hoggard Dep. E.333-34.

The Ninth Circuit did not treat as "believed" direct evidence for the Petitioners and chose not to look at inferences in the light most favorable to them. The court weighed selected parts of the evidence while treating as non-existent other relevant evidence. Further, the court made credibility determinations. In the result,

the court concluded that the Petitioners' claim was implausible in the face of direct evidence to the contrary.

CONCLUSION

While summary judgment may constitute an efficient means of dispensing with meritless claims, one of its chief dangers lies in the fact that improper use means a significant violation of constitutional rights. "No less formidable than any other constitutional guarantee, the Seventh Amendment suffers as the courts broaden summary judgment standards, because it is summary judgment that deprives a litigant of jury review."[37] The confusion regarding the proper application of the summary judgment standards has caused some courts to infringe upon the province of the jury in derogation of the Seventh Amendment. As this Court has said, "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[38] To curb these constitutional intrusions and to restore proper and consistent application of summary judgment law, this Court should grant a writ of certiorari and address these issues.

For the foregoing reasons, the Petitioners respectfully request that this Petition for a Writ of Certiorari be granted.

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37. Weakland, *supra* at 28.

38. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1934).

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 15, 1996

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 93-17105

D.C. No. CV-91-01169-GEB

RONALD L. RENNICK; RICHARD S. RENNICK; VANTEC VENTURES CORPORATION; HHC-HOME HEALTH CARE, INC., HOME I.V. THERAPY OF SOUTHERN OREGON, INC; HOME INFUSION CARE OF EUGENE, INC. d/b/a OPTION Care of Eugene,

Plaintiffs-Appellants,

v.

OPTION CARE, INC.,

Defendant-Appellee.

ORDER

Before: GOODWIN, POOLE and KLEINFELD, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Kleinfeld voted to reject the suggestion for rehearing en banc. Judges Goodwin and Poole so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appendix A

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED FEBRUARY 22, 1996

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93-17105

D.C. No.
CV-91-01169-GEB

RONALD L. RENNICK; RICHARD S. RENNICK; VANTEC VENTURES CORPORATION; HHC-HOME HEALTH CARE, INC., HOME I.V. THERAPY OF SOUTHERN OREGON, INC; HOME INFUSION CARE OF EUGENE, INC. d/b/a O.P.T.I.O.N. Care of Eugene,

Plaintiffs-Appellants.

v.

O.P.T.I.O.N. CARE, INC.,

Defendant-Appellee.

OPINION

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding

Appendix B

Argued and Submitted
May 11, 1995 — San Francisco, California

Filed February 22, 1996

Before: Alfred T. Goodwin, Cecil F. Poole and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Kleinfeld

COUNSEL

Dale A. Cooter, Cooter, Mangold, Tompert & Chapman, P.C., Washington, D.C., for the plaintiffs-appellants. David J. Butler (On the Briefs), and Barry M. Heller (Argued), Brownstein, Zeidman & Lore, A Professional Corporation, Washington, D.C., for the defendants-appellees.

OPINION

KLEINFELD, Circuit Judge:

We affirm a summary judgment. We conclude that the parties had not entered into a contract. The claims to the contrary rely on a handshake and a letter of intent. Though in appropriate circumstances, either or both could manifest agreement, here the express provisions of the letter of intent establish that, as a matter of law, no contract was made.

Appendix B

I. Facts.

O.P.T.I.O.N. Care, Inc., a California corporation, franchises home intravenous therapy services. These services include chemotherapy, nutrient infusions for patients unable to eat, and pain management infusions such as intravenous morphine.

The Rennicks, a physician in Oregon and an attorney in Canada, sought to become O.P.T.I.O.N.'s sole Canadian franchisee. Vantec, Inc., a Canadian firm, proposed to invest money in the project. Vantec had people with the experience and contacts to negotiate effectively with the Canadian government. Beginning in September of 1986, the Rennicks and Vantec negotiated with O.P.T.I.O.N. toward an exclusive Canadian franchise.

The Rennicks and Vantec argue that an agreement was reached at a meeting of the principals in British Columbia on July 3, 1990. Before the meeting, the Rennicks circulated a five page single spaced written agenda. They proposed discussing numerous matters of capitalization and relations among the existing and planned corporations, as well as the business plan for the contemplated Canadian franchise. The agenda expressly provided that the terms of an agreement would be formulated "for Board approval of all parties:"

> PURPOSES:
>
> — To discuss proposed reverse takeover of [Vantec] by HHC and proposed equity participation by [O.P.T.I.O.N.].

Appendix B

> — To formulate terms of a proposed initial agreement to this end *for Board approval of all parties.*
>
> — To formulate proposed general development business plan for specific time periods.

(emphasis added.)

This provision in the Rennicks' agenda for approval by the respective boards of directors was consistent with the restriction O.P.T.I.O.N. had put on its president at its board meeting just before the July 3 meeting. He was expressly not authorized to commit the corporation without subsequent board of directors approval:

> Discussion continued and the Board was assured that any transaction concerning Canada would come back to the Board for approval. Hoggard [O.P.T.I.O.N.'s president], in essence, is getting authority to move forward but must have final Board approval before making any commitments.

One of the Vantec negotiators testified that at the end of the meeting, everyone ceremoniously shook hands:

> At the end of the meeting I volunteered that the way we had formalized relationships before getting lawyers involved was to sort of do it on a handshake basis, and that we wanted to feel that the people we were

> dealing with were as good as their word. And we usually formalized that by a handshake on the deal. So I proposed that, having spent these previous months and these three of four hours bringing into the best form we could our understandings, that we formalize the deal by a handshake. And my recollection is that Mitch enthusiastically agreed to that and all the principal parties go up and circulated around the room and shook hands with each other on having made the deal.

Oddly, no other deposition testimony is cited regarding this handshaking. On summary judgment we assume for purposes of determining whether the movant was entitled to judgment as a matter of law, that the facts were as contrary to the movant's position as the cognizable evidence would establish if believed. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). Thus we assume that the parties shook hands "before getting lawyers involved" in order to give some formality to their understandings.

At the end of the July 3 meeting, some sort of documentation was to be prepared, though the parties have differing recollections on precisely what it was to be. A Vantec person thought that "the documentation necessary to implement the agreement would — the parties would work on it as quickly as possible and try to have a closing by the end of July 1990." Rick Rennick testified that the Vantec person who testified to the handshake said that Mr. Rennick and one of the O.P.T.I.O.N. people should "put together something that Vantec could base a public announcement on," so Mr. Rennick did a first draft of a letter of intent. One of the O.P.T.I.O.N. people testified that the

remark was made at the end of the meeting, "we understand you're going to send us a draft of the letter of intent. We'll work it over, we'll get back to you, and we'll try to do it in timely fashion." No one contradicted this. There is no genuine issue of fact as to the proposition that some document was contemplated, and that the Rennicks were to prepare and circulate a first draft to be reviewed by the other parties.

Rick Rennick circulated a draft letter of intent on July 6. The draft provided that final documentation required the approval of the boards of directors of all three entities. After reviewing the July 6 draft, an O.P.T.I.O.N. vice-president requested additional language, providing for an "interim agreement" which would be subject to approval by the parties' boards of directors. Language to this effect was included in a July 17 draft.

After receiving the July 17 draft, O.P.T.I.O.N.'s president added language making it clear that O.P.T.I.O.N. did not intend to enter into a contract at the July 3 meeting: "respective intentions . . . expressed during a meeting . . . directed toward the creation of a binding interim agreement and other contracts" and "intent to continue good faith discussions directed toward the creation of formal written contracts." O.P.T.I.O.N. also added language indicating that O.P.T.I.O.N. did not, by signing the letter of intent, mean to make a contract: "with the understanding that this letter of intent is of no binding effect on any party hereto." O.P.T.I.O.N.'s resident signed the letter of intent so modified, and sent it to Rick Rennick with a July 20 cover letter advising that language had been added "to clarify the intent of O.P.T.I.O.N., Inc. in signing this document."

As signed by all parties effective July 20, the letter of intent said that the July 3 meeting was "directed toward" making an agreement, and that the parties intended to negotiate toward

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creation of written contracts subject to approval by the parties' boards of directors:

> The purpose of this letter is to acknowledge the respective intentions of HHC, VVC [Vantec] and OCI [O.P.T.I.O.N.], expressed during a meeting held in Richmond, B.C., on July 3, 1990, and directed toward the creation of a binding interim agreement and other contracts designed to implement various proposed relationships among the parties.
>
> . . .
>
> . . . [T]he signatories to this letter confirm their intent to continue good faith discussions directed toward the creation of formal written contracts that, upon approval by the board of Director of each party, will be executed to establish the following arrangements, and to do such other things as may be required in connection therewith.
>
> . . .
>
> . . . Immediately upon receipt of your acceptance of the terms hereof, we will proceed to make arrangements with counsel for each of the parties for the completion of the Interim Agreement aforesaid and the completion of the final formal documentation, with the understanding that this letter of intent is of no binding effect on any party hereto.

The letter of intent also provided that following the execution of the letter of intent and before the formal contracts on the individual transactions, "the parties shall firstly execute and deliver an Interim Agreement (pre-transaction agreement) specifying the nature of the transactions required to establish the relationships set out in paragraphs 1 through 10" approval of which "shall be subject to Board of Directors approval of each party and completion of satisfactory review of financial and other information . . . ."

No interim or final agreement was ever signed. The O.P.T.I.O.N. board never approved any transactions referred to in the letter of intent. The deal fell apart. Basically, a new person took over control of O.P.T.I.O.N. and chose not to proceed. Meanwhile, Vantec took over the Rennicks' company, the Rennicks and their business consultant took a majority interest in Vantec, and Vantec issued a press release announcing its expectation of a deal. The Rennicks' theory of the case is that a deal was made at the July 3 meeting, and the new owner of O.P.T.I.O.N. reneged, O.P.T.I.O.N.'s theory is that they never made a deal. We conclude, after *de novo* review of the record, that O.P.T.I.O.N. was correct as a matter of law, so summary judgment in its favor was appropriate.

II. Analysis.

The district court's grant of summary judgment is reviewed *de novo*. *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). The district court granted O.P.T.I.O.N.'s motion for summary judgment based upon the grounds that the alleged agreement between appellants and O.P.T.I.O.N. failed to satisfy the statute of frauds. On appeal, we may affirm on any ground supported by the record. *First Pacific Bank v. Gilleran,*

40 F.3d 1023, 1024 (9th Cir. 1994). We affirm on the ground that no contract was made, and do not reach the question whether, if a contract was made, enforcement would be contrary to the statute of frauds.

An initial question is what law applies. It might be arguable whether we should apply the law of one or another of the provinces of Canada, because the July 3 meeting was in British Columbia. Vantec was an Alberta company, and performance would be in Canada: California law, because O.P.T.I.O.N. did business in California: or Oregon law, because the Rennicks did business in Oregon. A district court sitting in diversity generally must apply the choice of law rules for the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Under California conflict of law rules, the parties may agree to what law controls, unless the choice is contrary to a fundamental interest of a state with a materially greater interest. *See Thomas v. Wentworth Hotel Co.*, 110 P. 942 (Cal. 1910); Restatement (Second) Conflict of Laws § 187 (1971 & Supp. 1988). There was no contractual provision governing choice of law, there being no contract, and the letter of intent said nothing about this detail. The parties have briefed the case, on both sides, on the assumption that California law applies, and they so stipulated at oral argument. We accordingly apply California law.

A. The July 3 handshake.

The Rennicks argue that the July 3 meeting resulted in binding oral contract. O.P.T.I.O.N., however, claims that the parties did not intend to be bound until obtaining board approval and formal documentation. The Rennicks argue that the formal handshake was evidence from which a jury could infer that an agreement was made July 3, and that the letter of intent was a mere memorialization of a contract already made.

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A manifestation of assent sufficient to conclude a contract is not prevented from doing so because the parties manifest an intention to memorialize their already made agreement in writing. Restatement (Second) of Contracts § 27 (1981); *Columbia Pictures Corp. v. De Toth*, 197 P.2d 580, 585 (Cal. Ct. App. 1948). But if a party knows that the other intends no obligation to exist until the written agreement is made, the earlier manifestation does not constitute a contract. Restatement (Second) of Contracts § 27 comment b; *Columbia Pictures Corp.*, 197 P.2d at 585-86. Whether the parties intended their oral agreement to be immediately effective or only to become binding on the execution of the writing depends on the circumstances. *McKeon v. Giusto*, 280 P.2d 782, 785 (Cal. 1955).

We assume that the handshakes really took place as one witness claimed. Handshakes are significant. When people shake hands, it means something, but several meanings are possible. "As a greeting, sign of friendship or goodwill, confirmation of a promise, bargain, etc.; (of combatants) as a sign of the absence of ill-feeling." Compact Oxford English Dictionary 1731 (2d ed. 1991). If there were nothing more than the testimony about the meeting and the handshake, a jury might reasonably infer either that the handshake was confirmation of a contract, or that it was an expression of friendship and the absence of ill will after a day of hard bargaining.

But there was something more, the agenda and the letter of intent. The agenda assured the parties that the July 3 meeting would not bind them, and would merely develop "proposed" agreement "for Board approval of all parties." The letter of intent said, in effect, "this is what we did at our meeting — we agreed to negotiate further, and agreed that we had no contract unless and until we put it in writing and our boards of directors approved it."

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The letter of intent expressly "is to acknowledge the respective intentions . . . during a meeting held in Richmond, B.C., on July 3, 1990, and directed toward the creation of a binding interim agreement and other contracts." The parties "confirm their intent to continue good faith discussions directed toward the creation of formal written contracts that, upon approval by the board of Director of each party, will be executed to establish the following arrangements." The letter then goes on to say that it too does not bind the parties to the Canadian venture contemplated, and there will be no contract until the parties' boards of directors approve a written contract. It says "this letter of intent is of no binding effect on any party hereto," in the context of postponing any binding contract until then. They speak plainly of their intention to work toward a deal to be put in writing, approved, and signed subsequently.

There is sometimes an implication in shaking hands that honor is pledged. That implication cannot create a contract here, though, because the parties expressly agreed that they did not yet have a contract. There is no dishonor in refusing to be bound by a contract to which a party expressly said it was not yet prepared to agree. The handshake "before getting lawyers involved" and before letting O.P.T.I.O.N.'s board decide whether to approve the deal would, if used to bind O.P.T.I.O.N., subvert the express intentions of the parties. A handshake cannot bind another to a contract, when the promisee knows that the prospective promisor has neither the intention nor the authority to make a binding promise. By custom, it is a rude insult to reject an outstretched hand in most circumstances, and to do so at then end of a long business meeting would likely prevent a future deal. The agenda circulated before the meeting, and the letter of intent signed afterward, said the meeting was for discussion, and that no party would be bound thereby.

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B. The letter of intent.

Appellants argue that, if the oral agreement they claim was made July 3 failed to satisfy the statute of frauds by itself, then the letter of intent should be taken as a sufficient written and signed memorandum. We do not reach the question whether the letter would satisfy the statute of frauds, because we conclude that as a matter of law, neither the July 3 oral understandings, nor the memorialization of those understandings in the letter of intent, amounted to a contract. The reason is that the parties intended not to be bound.

"Letter of intent" is not a legal term of art. The term is seen in real estate development documents, securities underwriting, and sales of corporate assets, among other areas. Generally, "letter of intent" refers to a writing documenting the preliminary understandings of parties who intend in the future to enter into a contract. *See A/S Apothekernes Laboratorium v. I.M.C. Chemical Group, Inc.*, 873 F.2d 155, 158 (7th Cir. 1989); Black's Law Dictionary at 814 (5th ed. 1979). "[T]he purpose and function of a preliminary letter of intent is not to bind the parties to their ultimate contractual objective. Instead, it is only 'to provide the initial framework from which the parties might later negotiate a final . . . agreement, if the deal works out.' " *A/S Apothekernes Laboratorium*, 873 F.2d at 158. As these authorities imply, calling a document "letter of intent" implies, unless circumstances suggest otherwise, that the parties intended it to be a nonbinding expression in contemplation of a future contract, as opposed to its being a binding contract.

Commonly a letter of intent is used so that people negotiating toward an agreement, who do not yet have one, can get their preliminary inclinations down on paper without

committing themselves. This avoids a misunderstanding that a commitment has been made. It also has value in preserving a common understanding of what has been talked about in earlier negotiations, before spending the time and money on later negotiations, and justifies further expenditures on attorneys and others. It may be used to stimulate negotiations with third parties, as where a shopping center developer shows a prospective lender a letter of intent from a potential anchor tenant, to induce the prospective lender to commence negotiations.

All these purposes are defeated if what was meant to be a nonbinding letter of intent is allowed to form the basis for a damages award. Letting a nonbinding letter of intent go to a jury as a possible basis for compensatory and perhaps punitive damages makes it too risky to sign one, so negotiators are deprived of this useful intermediate device between vague feelers and a binding contract. This is not to say that a letter of intent cannot be a contract. Regardless of the title, if the content shows that the parties intended to be bound, and the other requisite of a contract have been satisfied, it may be a contract. We have to study the words and context to decide.

It is a basic tenet of contract law that creation of a valid contract requires mutual assent. *Kruse v. Bank of America*, 248 Cal. Rptr. 217, 229 (Ct. App. 1988): John D. Calamari and Joseph M. Perillo, The Law of Contracts §§ 11-12 (1970). "A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent." Restatement (Second) of Contracts § 26 (1981). Parties must communicate their mutual consent to enter into a contract. Cal. Civ. Code §§ 1550, 1565 (1982 & Supp. 1995).

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If there "is a manifest intention that the formal agreement is not to be complete until reduced to a formal writing to be executed, there is no binding contract until this is done." *Smissaert v. Chiodo*, 330 P.2d 98, 100 (Cal. Ct. App. 1958); *see also Forgeron Inc. v. Hansen*, 308 P.2d 406, 411 (Cal. Ct. App. 1957). An agreement to make an agreement, without more, is not a binding contract. *Autry v. Republic Productions*, 180 P.2d 888, 893 (Cal. 1947). "Whether a writing constitutes a final agreement or merely an agreement to make an agreement depends primarily upon the intention of the parties. In the absence of ambiguity this must be determined by a construction of the instrument taken as a whole." *Smissaert*, 330 P.2d at 100. *See also Beck v. American Health Group Intern.*, 260 Cal. Rptr. 237, 241 (Ct. App. 1989). "Preliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement." *Kruse v. Bank of America*, 248 Cal. Rptr. at 229.

The letter of intent signed by the Rennicks, Vantec, and O.P.T.I.O.N. provided by its content as well as its title that it was not intended to bind the parties to the contemplated Canadian venture. It said that "this letter of intent is of no binding effect," and that the parties were negotiating toward an interim agreement not yet made, and that such an agreement would be a subsequent written document subject to approval by the parties' boards of directors:

> The *purpose of this letter is to acknowledge the respective intentions* of HHC, VVC [Vantec] and OCI [O.P.T.I.O.N.], expressed during a meeting held in Richmond, B.C., on July 3, 1990, and *directed toward the creation of a binding interim agreement and*

> *other contracts* designed to implement various proposed relationships among the parties.
>
> . . .
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> . . . [T]he signatories to this letter confirm their *intent to continue good faith discussions directed toward the creation of formal written contracts that, upon approval by the board of Director of each party*, will be executed to establish the following arrangements, and to do such other things as may be required in connection therewith.
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> . . .
>
> . . . Immediately upon receipt of your *acceptance of the terms* hereof, we will proceed to make arrangements with counsel for each of the parties for the completion of the Interim Agreement aforesaid and the completion of the final formal documentation, *with the understanding that this letter of intent is of no binding effect on any party hereto.*

(emphasis added).

The Rennicks argue that such language in the letter of intent as "OCI shall grant to HHC/VVC . . . ," and "OCI shall provide . . . ," shows that mandatory obligations were meant to be imposed. One must wonder how such an argument can be

made with a straight face, in light of language, required by O.P.T.I.O.N. before it would sign, saying "this letter of intent is of no binding effect on any party hereto." In that context, "[O.P.T.I.O.N.] shall grant," and so forth, meant "if we ultimately enter into a binding contract, then it is our present intention that O.P.T.I.O.N. shall grant . . . ."

Where a letter says that it is subject to the terms of a contemplated mutual agreement to be written and singed in the future, but other evidence indicates that the parties decided to be bound by the terms of the letter, the letter may amount to a contract. *Seamen's Direct Buying Serv. v. Standard Oil*, 686 P.2d 1158 (Cal. 1984), *overruled in part by Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669 (Cal. 1995), and *disapproved of by Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 902 P.2d 740 (Cal. 1995). But the rights of private parties to enter into contracts also embraces their rights not to, and there is no contract where the objective manifestations of intent demonstrate that the parties chose not to bind themselves until a subsequent agreement is made. *Beck*, 260 Cal. Rptr. at 242.

The letter of intent in the case at bar shows that the parties intended not to be bound to the Canadian venture unless and until a subsequent agreement was made and was approved by their boards of directors. The one proposition to which they expressed their intention to agree was that they had not as yet agreed to the Canadian venture.

C. Unreasonable reliance.

Plaintiffs argue that the claimed promises of O.P.T.I.O.N. should be enforced under the doctrines of part performance and promissory estoppel. These doctrines appear to be treated as one

under California law. John D. Calamari & Joseph M. Perillo, The Law of Contracts § 327 at 499. In order to constitute part performance the acts (1) must be "unequivocally referable" to the terms of the oral contract, *American Cas. Co. v. Curran Productions, Inc.*, 28 Cal. Rptr. 131, 135 (Ct. App. 1963); (2) must irretrievably change plaintiffs' position, and (3) must be performed in reasonable reliance on the contract. *See Monarco v. Lo Greco*, 220 P.2d 737 (Cal. 1950).

The Rennicks and Vantec claim that they relied on O.P.T.I.O.N.'s commitment to the Canadian venture in several ways. The reliance included a change in corporate structures and ownership, so that Vantec took over the Rennicks' company, and then the Rennicks and their business consultant took a majority interest in Vantec. Vantec also issued a press release about the contemplated venture; its stock was publicly traded on the Alberta stock exchange.

If a party refuses to be bound, yet the other changes its position in reliance on the expectation that a contract will be made, reliance on the expectation that a contract will be made, reliance on the expectations cannot turn the non-promise into a contract. *See Phillippe v. Shapell Industries, Inc.*, 743 P.2d 1279 (Cal. 1987) (holding that broker's reliance on a promise which he knew to be unenforceable was unreasonable, and he therefore suffered no unconscionable injury). The reason is that reliance must be reasonable to set up an estoppel. In light of the unequivocal nonbinding language in the letter of intent, reliance on the existence of a contract was unreasonable as a matter of law. The July 3 meeting and the letter of intent might have made the Rennicks' and Vantec's actions prudent as a matter of business judgement, in contemplation of a probable contract, but they could not control whether the reliance would be reasonable

for purposes of binding O.P.T.I.O.N. to a contract to which it expressly had as yet refused to agree. *See Bank of the West v. Valley Nat. Bank of Arizona*, 41 F.3d 471, 478 (9th Cir. 1994).

D. Other theories.

The Rennicks claim that O.P.T.I.O.N. violated California Franchise Investment Law. *See* Cal. Corp. Code §§ 31300, 31301. That statute protects a person who "shall have purchased a franchise." *Id.*, and they did not, with respect to the Canadian venture, so this claim was properly dismissed. *See Dameshghi v. Texaco Refining & Marketing Inc.*, 6 Cal. Rptr. 2d 515, 527 (Ct. App. 1992) (offeror seeking to purchase franchise from franchisee has no standing to sue franchiser under state franchise law, as he was not a "franchisee"), *overruled on other grounds by Trope v. Katz*, 902 P.2d 259 (Cal. 1995). Appellants cite *Ciampi v. Red Carpet Corp.*, 213 Cal. Rptr. 388 (Ct. App. 1985), *reh'g granted*, but *Ciampi* may not be cited because rehearing was granted and the opinion on rehearing was not published. Cal. Rules of Court 976, 977.

The Rennicks claim breach of the covenant of good faith and fair dealing. That is a covenant implied in a contract. *Careau & Co. v. Security Pacific Business Credit*, 272 Cal. Rptr. 387, 399 (Ct. App. 1990). "[T]he validity of [the covenant of good faith and fair dealing cause of action] is dependent upon the formation of a contractual relationship." *Beck v. American Health Group International, Inc.*, 260 Cal. Rptr. 237, 242 (Ct. App. 1989) (citing *Kruse v. Bank of American*, 248 Cal. Rptr. 217 (Ct. App. 1988)). *See also Hess v. Trans-America Occidental Life Ins. Co.*, 235 Cal. Rptr. 715 (Ct. App. 1987). There was no contract, so the claim of breach of the covenant of good faith and fair dealing was properly dismissed.

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The Rennicks also claim breach of O.P.T.I.O.N.'s fiduciary duty to them as a joint venturer. "Whether a joint venture exists depends on the intention of the parties." *April Enterprises, Inc. v. KTTV and Metromedia, Inc.*, 195 Cal. Rptr. 421, 427 (Ct. App. 1983). O.P.T.I.O.N. had not yet agreed to engage in a joint venture or any other kind of continuing relationship with the Rennicks and Vantec. *See Pacific Hills Corp. v. Duggan*, 19 Cal. Rptr. 291 (Ct. App. 1962) (an agreement to negotiate joint venture agreement is not binding). Business negotiation does not create a fiduciary relationship.

III. Conclusion.

There was no contract between the parties because the letter of intent clearly indicated that no contract yet existed. Summary judgment is appropriate "when the contract terms are clear and unambiguous, even if the parties disagree as to their meaning." *United States v. King Features Entertainment, Inc.*, 843 F.2d 394, 398 (9th Cir. 1988). In the case at bar, the uncontradicted facts are that the parties went to a meeting intending not to be bound until they prepared a written agreement to be approved by their boards of directors. They agreed after the meeting that they had not bound themselves at the meeting, and would not without approval of a written agreement by their boards of directors. Where the evidence shows that as a matter of law, a contract claim cannot prevail, summary judgment is an important device to prevent litigation from operating as a tool to extract an unjust settlement. It was appropriate here.

AFFIRMED.

APPENDIX C — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED SEPTEMBER 28, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civ. S-91-1169 GEB

RONALD L. RENNICK, et al.,

Plaintiffs,

v.

OPTION CARE, INC.,

Defendant.

ORDER

DATE: 9/28/93

Plaintiffs claim OPTION Care agreed to provide them the exclusive and perpetual right to develop and use the OPTION Care name in Canada, that OPTION Care agreed to grant Plaintiffs ten new franchises in the United States, and that OPTION Care agreed to allow Plaintiffs to acquire ten existing franchises in the United States. Plaintiffs allege that an oral contract (a "handshake deal") containing these elements was formed at a July 3, 1990, meeting between the two parties. Defendant moves for reconsideration of the denial of its motion for summary judgment asserting, *inter alia*, that the alleged oral contract is unenforceable pursuant to the Statute of Frauds. Cal.

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Civ. Code § 1624. Plaintiffs respond, *inter alia*, that defendant is estopped from asserting a statute of frauds defense because Plaintiffs have partially performed their part of the bargain and have "irretrievably changed their position" in reasonable reliance on the oral contract.

Factual and Procedural Background

Defendant OPTION Care franchises "technology and know-how relating to alternative setting infusion therapy" (home IV therapy). Plaintiffs Ronald and Rick Rennick are investors who sought to introduce home infusion therapy into the Canadian market. In 1989, plaintiff Ronald Rennick incorporated Plaintiff Home Infusion Care of Eugene, Inc. Plaintiff Rick Rennick created plaintiff Home Health Care, Inc. (HHC) as a vehicle for the Rennicks to bring home infusion care into Canada. Plaintiff Vantec is a publicly traded venture capital company.

In 1989 and 1990, the Rennicks and OPTION Care began negotiations for a development agreement to bring home infusion therapy into Canada. By January 1990, Vantec began negotiations to invest in HHC. On June 8, 1990, HHC and Vantec met with OPTION Care in Chico, California, for the purpose of discussing a transaction involving HHC, Vantec, Andy Dobrodzicki (a Canadian healthcare consultant), and OPTION Care. The contemplated transaction would have allowed Vantec and HHC to acquire the rights to market the OPTION Care system in Canada, the right to establish new franchise territories in the United States, and the right to acquire some number of existing franchises in the United States. On June 27, 1990, Mitch Hoggard, an officer of OPTION Care, discussed the potential transaction with OPTION Care's board of directors, and

received "authority to move forward" "subject to "final board approval before making any commitments."

On July 3, 1990, HHC and Vantec met with OPTION Care in Richmond, British Columbia. It was at this meeting that Plaintiffs allege an oral contract was formed. Although the details of the component contracts were to be fully settled later, several key terms are undisputed: (1) HHC was to have the exclusive rights to the OPTION Care system in Canada and to the name "OPTION Care (Canada) Inc."; (2) HHC would have the right to acquire ten existing OPTION Care franchises in the United States, and the right to establish, without franchise fee, ten new OPTION Care franchises in the United States; (3) OPTION Care would receive a 15% equity interest in Vantec; and (4) Hoggard and Vickery would each receive 2% interests in Vantec. Finally, OPTION Care agreed to consent to the reverse takeover of HHC by Vantec, which consent was required by its franchise agreement with HHC.

Following the July 3, meeting, the parties entered into a letter of intent on July 20, 1990. This letter of intent was described in the Court's Order of October 22, 1992. Following the letter of intent, the parties continued to negotiate towards the anticipated contractual agreements. Moreover, HHC and Ronald Rennick conducted the first step of a reverse takeover transaction. HHC acquired Ronald Rennick's two Oregon corporations, which owned Oregon home IV therapy franchises, in exchange for issuing 50% of HHC's stock to Rennick.[1] The reverse takeover was consummated in December 1990.

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1. Under the existing franchise agreement, Plaintiffs were required to obtain OPTION Care's consent to the transfer. OPTION Care consented to the transfer of these franchises.

Eventually, the negotiations reached an impasse and this lawsuit ensued.

Plaintiffs' filed a ten-count amended complaint on December 26, 1991, alleging *inter alia* that Defendant breached the oral contract formed between the parties on July 3, 1990. Federal jurisdiction is based upon diversity of citizenship and a controversy involving more, than $50,000. 28 U.S.C. § 1332. Defendant asserted nine affirmative defenses, including that the alleged oral agreement is barred by the statute of frauds.

Defendant now moves for summary judgment claiming Plaintiffs' claims are barred by the statute of frauds. Plaintiffs contend Defendant is estopped from asserting the statute of frauds because Plaintiffs irretrievably changed position in reasonable reliance on the oral contract.

I. STATUTE OF FRAUDS

A. *CONTRACT TO BE PERFORMED WITHIN ONE YEAR*

The California Statute of Frauds provides that "an agreement that by its terms is not to be performed within a year from the making thereof" is invalid, unless the agreement, or some note or memorandum thereof, are in writing and subscribed by the party to be charged. Cal. Civil Code § 1624(a).[2]

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2. Defendant further alleges that the Statute of Frauds provision within the California Commercial Code applies to the portion of the agreement for the sale of securities. Cal. Comm. Code § 8319 provides, in pertinent part, that "(1) A contract for the sale of securities is not enforceable by way of action or defense unless . . . : (a) There is some writing signed by the party against whom enforcement is sought or by his or her authorized agent or broker, sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price."

Furthermore, "an oral agreement to make a contract which must be in writing, is itself within the statute of frauds." *Paul v. Layne & Bowler Corp.*, 9 Cal. 2d 561, 564 (1937); *American Casualty Co. v. Curran Prod.*, 212 Cal. App. 2d 386, 392 (1963). The slightest possibility that the contract can be fully performed within one year will often remove the agreement from the Statute of Frauds. *White Lightning Co. v. Wolfson*, 68 Cal. 2d 336, 340 n.2. (1968); *Western Chance No. 2, Inc. v. KFC Corp.*, 957 F.2d 1538, 1541 (9th Cir. 1992) (construing Arizona law). In *Western Chance*, an agreement imposing a continuing obligation on KFC to reserve the Tucson market exclusively for Western Chance for twenty years or perpetually was found to be an agreement not capable of performance within one year and was subject to the statute of frauds.

Plaintiffs assert that the agreements could have been performed within one year for two reasons: (1) the oral agreement was an agreement to agree which could have been accomplished "in a heartbeat;" and (2) the parties could have died, been dissolved or entered bankruptcy.[3] Plaintiffs focus on whether the parties could have entered into the contracts within a year. However, under *Paul* and *Curran*, the issue is not whether the agreement to execute an agreement can be performed within one year, but whether the terms of the underlying contracts can be performed within one year. Even if the agreement could be entered "in a heartbeat," the time relevant to the one year requirement of the statue of frauds is the time in which the underlying contracts could be performed.

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3. This argument from plaintiff's original briefs was not continued in the motion for reconsideration. However, any discharge by operation of law (bankruptcy) is not performance as required by the Statute of Frauds. Moreover, an agreement to terminate the contract, entered in the future, is also insufficient to take the agreement outside of the Statute of Frauds.

Appendix C

One part of the present deal was an agreement to enter ten franchises using the standard OPTION Care franchise agreement, which contains a 20 year term. Another was OPTION Care's grant to HHC of the exclusive and perpetual right to use the OPTION Care system in Canada. Under *Western Chance*, these agreements are subject to the statute of frauds since there is no possibility they can be performed within one year.

B. *FACT OF AGREEMENT*

A writing must unequivocally show the fact of agreement on its face to satisfy the statute of frauds. *Franklin v. Hansen*, 59 Cal. 2d 570 (1963); *Phillipe v. Shapell Industries*, 43 Cal. 3d 1247 (1987) (applying the statute of frauds requirement that an agreement to employ a real estate broker must be in writing). *See also Western Chance*, 957 F.2d at 1542 (finding that memorandum agreement which stated the option was tentative until . . . final approval" was a fatal defect in the writing, applying Arizona law).

"The objective intent as evidenced by the words of the instrument, not the parties' subjective intent, governs our interpretation." *Beck v. American Health Group International*, 211 Cal. App. 3d 1555, 1562-3 (1989). "That plaintiff may have intended or believed a binding contract came into existence upon his signing the letter is immaterial in the face of its language which plainly indicated otherwise. *Id.* at 1563.

Defendant contends that a finding that the letter of intent satisfies the Statute of Frauds necessarily relies upon the handshake as evidence of the fact of agreement. However, the writing itself must show the fact of agreement to satisfy the Statute of Frauds. Since the language in the letter of intent,

contrary to stating the fact of agreement, states that the parties do not intend to be presently bound, it can not satisfy the Statute. Plaintiff's argument to the contrary relies upon *Seck v. Foulks*, 25 Cal. App. 3d 556 (1972), in which a California Court of Appeals held a "memo" signed by defendant which stated "6% comm." to satisfy the Statute of Frauds. This case, however, presents a problem which was not addressed in *Seck*. In this case, while the terms of the letter of intent are clear, the language of the letter of intent contradicts the Plaintiffs contention that there was a present agreement. If a contract is subject to the Statute of Frauds, a court may enforce only those terms of a contract which are in writing. *Ellis v. Klaff*, 96 Cal. App. 2d 471 (1950). In this case, the letter of intent does not satisfy the Statute of Frauds because it states a clear intent not to be bound in the present, but to work toward agreement in the future. *See Western Chance*, 957 F.2d at 1542 (memorandum of agreement which was "tentative until all paper work is cleared . . ." did not satisfy the statute of frauds); *Beck*, 211 Cal. App. 3d at 1562-3 (no agreement where parties intend to submit an agreement to counsel for review).

Likewise, the statute of frauds for the sale of securities states that a contract for the sale of securities is not enforceable unless there is a writing signed by the party against whom enforcement is sought "sufficient to indicate that a contract has been made." Cal. Comm Code § 8319(1)(a). That requirement is not satisfied in this case. Having failed to show that the Statute of Frauds was satisfied by a writing, Plaintiffs contend that they partially performed their obligations under the contract, such that Defendant is estopped from asserting the Statute as a defense.

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C. *PART PERFORMANCE*

The parties agree that Plaintiffs can establish their actions constitute part performance only if they were unequivocally referable to the contract, by which they irretrievably changed position, so that it would create an injustice to allow defendant to invoke the statute of frauds. *Hall v. Hall*, 222 Cal. App. 3d 578, 586 (1990); *American Casualty Co.*, 212 Cal. App. 2d at 392-3.

Defendant argues that the agreement to transfer securities does not satisfy the part performance requirement of Cal. Comm. Code § 8319 which requires that Plaintiff have tendered the stock to be transferred to OPTION Care, or that they sent a confirmation of the alleged transfer. There is no evidence of either a tender of the stock or a confirmation of transfer in this case. Therefore, OPTION Care would be entitled to summary judgment on the securities count, Count VI.

The analysis of the remaining counts unfolds in several steps. The Court must: (1) identify the acts asserted to have constituted partial performance; (2) determine whether those acts are "unambiguously referable" to the terms of the oral contract; (3) decide whether the performance of those acts has "irretrievably changed plaintiffs' position"; and (4) find whether those acts were performed in reasonable reliance on the contract.

First, the acts asserted to constitute partial performance are easily identified. Plaintiffs assert that they partly performed their obligation by negotiating to acquire existing franchises and by completing the "reverse takeover" between Vantec and HHC.

Second, we must determine whether those acts are "unambiguously referable" to the terms of the oral contract.

Here, it is undisputed that Plaintiffs began negotiations to acquire several of Defendant's franchises after the formation of the contract. However, these negotiations are *not* unambiguously referable to the contract. First, the negotiation for the additional franchises is not unambiguously referable to the contract because Plaintiffs may have acquired these franchises in the absence of the contract. *See Western Chance No. 2 v. KFC Corp.*, 734 F. Supp. 1529, 1537 (D. Ariz. 1990) (acquisition of franchise was not part performance). Additionally, the "reverse takeover" was not unambiguously referable to the July 3 oral contract. The parties recited in the Stock Purchase Agreement by which the reverse takeover was affected, that they were relying on the Letter of Intent, not the July 3 oral contract. Therefore, the reverse takeover was not performed in partial performance of the July 3 contract.

Third, Plaintiffs did not irretrievably change their position by negotiating for the existing franchises. Mere negotiation for the acquisition of existing franchises does not effect a change in position.

None of Plaintiff's proffered actions in part performance of the oral agreement satisfies the elements of part performance. Therefore, Plaintiff's part performance defense to the statute of frauds fails.

D. *ESTOPPEL TO DENY CONTRACT*

The doctrine of estoppel permits the enforcement of oral contracts when one party will suffer unconscionable injury if the contract is not enforced, because he has been induced by the other to seriously change his position in reasonable reliance on the contract. *Monarco v. Lo Greco*, 35 Cal. 2d 621 (1950). Courts

have difficulty separating part performance claims from estoppel claims. In fact, the parties in this case do not make separate arguments. However, applying the standard of *Monarco*, it is clear that Plaintiffs have not suffered "unconscionable injury," and that their "reasonable reliance" is also unsubstantiated in light of the fact that the only written agreement was expressly made non-binding.

II. THE REMAINING CLAIMS

Plaintiffs have five remaining claims in their amended complaint[4]: (1) Claim IV for violation of the California Franchise Investment Law, (2) Claim VII for breach of the covenant of good faith and fair dealing, (3) Claim IX for breach of fiduciary duty, and (4) Claim X for promissory estoppel.

A. *Violation of the California Franchise Investment Law.*

Plaintiffs assert they have rights both under the July 3, 1990, agreement and Rennick's ongoing Oregon OPTION Care franchises. They assert Defendant violated Cal. Corp. Code §§ 31300 and 31301.

Section 31301 provides a remedy to a person who, while relying upon a false or misleading statement by a franchisor, purchases a franchise. While Plaintiffs negotiated to purchase several franchises, they did not actually purchase a franchise. The contract upon which they relied for this claim, was the July 3, 1990, oral agreement. That agreement is unenforceable under the Statute of Frauds. Therefore, Plaintiffs have no claim under § 31301.

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4. All further references to the complaint, are to the amended complaint.

Appendix C

Section 31300 holds a person who offers to sell a franchise in violation of § 31101, 31110, 31200 or 31202, liable for damages caused by the violation. Sections 31200 and 31202 relate to willful untrue statements, which are not alleged here. Moreover, the statements must relate to the information which is required to be disclosed in a registration statement.[5] The alleged misrepresentations in this case relate to whether OPTION Care would grant Plaintiffs' franchises, not misrepresentations relating to the franchises themselves which would be disclosed in a registration statement. California Franchise Law has never been used to hold a franchisor liable even when no untrue statement *about the franchise* was made, but where an alleged oral agreement to negotiate in good faith to enter into a franchise was breached.

Section 31300 only holds the franchisor liable to the "franchisee or subfranchisor." The Rennicks argue that they are "franchisees" since they owned two Oregon OPTION Care franchises prior to the proposed deal. Plaintiffs further argue that the Rennick's transfer of the franchise rights to Vantec gave Vantec standing as a franchisee. However, the allegations of misrepresentation in this case relate to the acquisition of new franchises not the Oregon franchises. Their status as franchisees of the Oregon franchises does not make them a franchisee for purposes of California law.

B. *Breach of the Covenant of Good Faith and Fair Dealing.*

Plaintiffs assert that their claim for breach of the covenant

---

5. In addition, the California Franchise Investment Law applies to offers and sales of franchises located in California. The offer in this case did not pertain to the sale of a franchise located within California.

of good faith and fair dealing survives the unenforceability of the contract. Plaintiffs seek to enforce the agreement to negotiate a contract in good faith, calling it a binding agreement to agree. However, under California law, an agreement to agree is unenforceable. *Eckles v. Sharman*, 548 F.2d 905 (10th Cir. 1977) (holding an option clause of a contract unenforceable as it was only an agreement to agree and stating that the controlling California law is that for there to be an enforceable contract the parties must agree on the essential and material terms). *See also Roth v. Garcia Marquez*, 942 F.2d 617 (9th Cir. 1991). Moreover, it is undisputed that the covenant requires a contract. *Careau & Co. v. Security Pacific Business Credit*, 222 Cal. App. 3d 1371, 1393 (1990); *Beck*, 211 Cal. App. 3d at 1563 (the validity of a claim for breach of the implied covenant of good faith and fair dealing is dependent upon the existence of an enforceable contract). Since an agreement to negotiate towards agreement in the future is unenforceable, the covenant of good faith and fair dealing must also be unenforceable. As OPTION Care states "it is contrary to logic and the law that a party barred from enforcing the explicit provisions of a contract may enforce the implied provisions that arise out of the same contract." In short, the implied covenant cannot arise as a term of an unenforceable oral agreement.

C. *Breach of Fiduciary Duty*

OPTION Care asserts that the elements of a joint venture were not present in the terms of the deal memorialized in the Letter of Intent and that even if they were, in the absence of a binding agreement to those terms, there can be no fiduciary duty. Plaintiffs assert that even in the absence of a binding contract, a tort claim for breach of fiduciary duty could arise from a joint venture.

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The elements of a joint venture are: "(1) joint interest in a common business; (2) with an understanding to share profits and losses; and (3) a right to joint control. . . . Such a venture or undertaking may be formed by parol agreement, or it may be assumed as a reasonable deduction from the acts and declarations of the parties. . . . Whether a joint venture exists depends on the intention of the parties." *April Enterprises, Inc. v. KTTV*, 147 Cal. App. 3d 805, 819-20 (1983). "Where evidence is in dispute, the existence or nonexistence of a joint venture is a question of fact to be determined by a jury." *Id.* at 820. However, "the mere fact that one party is to receive benefits in consideration of services rendered or for capital contributions does not . . . make him [or her] a joint venturer." *Cislaw v. 7-Eleven*, 4 Cal. App. 4th 1284, 1297 (1992).

Plaintiffs' argument breaks down into simple conclusory assertions that each of the elements above are met, and that since a joint venture can be proven through the oral agreement, summary judgment is inappropriate. However, moving beyond the general claims, the facts bely the Rennicks' claims.

There is direct evidence that the parties were pursuing a series of contracts which would create relationships between them as franchisor-franchisee, licensor-licensee, and corporation and minority shareholder. Neither individually, nor taken together do these relationships create a joint venture. OPTION Care was to receive a 15% interest in Vantec in consideration of the license to develop the OPTION Care system in Canada. However, the rights to control and profits arising from a 15% ownership interest are clearly defined and would not satisfy the joint venture control requirements. Moreover, the fact that OPTION Care was to own 15% of the corporation casts their relationship in terms of stockholder-corporation rather than joint

venturer. A shareholder's role establishes rights and responsibilities which are inconsistent with the existence of a joint venture. Moreover, the relationship between Vantec and OPTION Care contemplated by the letter of intent does not appear to create a single business enterprise, but rather envisions a series of defined, highly regulated, relationships between the parties.

Plaintiffs argue that the absence of an enforceable agreement does not defeat a fiduciary duty claim since the signed, non-binding letter of intent contains the terms to which the parties agreed to be bound. Such provisions, Plaintiffs argue, must be construed to be the terms of the potential joint venture. However, those terms are inconsistent with the existence of a joint venture. Accordingly, summary judgment is appropriate.

Moreover, since the letter of intent was not binding, by its terms, even if performance of the terms of the letter of intent would have created a joint venture, an agreement to agree to a joint venture is invalid and creates no joint venture. *Pacific Hills Corp. v. Duggan*, 199 Cal. App. 2d 806, 812 (1962).

D. *Promissory Estoppel.*

Plaintiffs assert OPTION Care promised to enter into a binding agreement with them and that they reasonably relied on OPTION Care's promise to their detriment. Defendant asserts its promise was contingent upon board of directors' approval and execution of written documents and therefore cannot form the basis for promissory estoppel. Defendant also contends that Plaintiffs' reliance upon the alleged oral July 3 agreement is unreasonable as a matter of law, since the July 20 letter of intent was expressly made non-binding. This argument is virtually indistinguishable from Plaintiffs' Statute of Frauds contentions.

Appendix C

The only unique argument concerns whether Plaintiffs can recover for the loss of the expected benefits of the intended agreement because of Defendant's failure to enter the contracts. However, when the principal loss in a promissory estoppel claim is the expected benefit of the bargain, the evidence of detrimental reliance is insufficient to override the policy and effect of the Statute of Frauds. *Western Chance No. 2*, 734 F. Supp. at 1537. The promissory estoppel doctrine requires any detrimental reliance by the promisee to be justifiable. The alleged reliance by Plaintiffs on the "handshake deal to make a deal" was not justifiable as a matter of law.

CONCLUSION

Defendant's Motion for Reconsideration of its Motion for Summary Judgment is GRANTED. Defendant's Motion for Summary Judgment is GRANTED upon reconsideration. The Clerk is directed to enter judgment for Defendant.

IT IS SO ORDERED.

DATED: September 24, 1993

s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

Appendix C

United States District Court
for the
Eastern District of California
September 28, 1993

* * CERTIFICATE OF SERVICE * *

2:91-cv-01169

Rennick

v.

OPTION Care Inc

I the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on September 28, 1993, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

David J Butler
Brownstein Zeidman and Lore
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SF/GEB

VC/GGH

Appendix C

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Orrick Herrington and Sutcliffe
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Cooter and Gell
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Franchetti and Franchetti
1121 L Street
Suite 610
Sacramento, CA 95814

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CASE NUMBER: CIV S 91-1169 GEB GGH

Ronald L Rennick et al

v.

Option Care Inc

JUDGMENT IN A CIVIL CASE

XX — **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 9/28/93.

Jack L. Wagner,
Clerk of the Court

ENTERED: September 28, 1993

by: s/ A. Bowser
A. Bowser, Deputy Clerk

Appendix C

United States District Court
for the
Eastern District of California
September 28, 1993

* * CERTIFICATE OF SERVICE * *
Entry on Civil Docket

2:91-cv-01169

Rennick

v.

OPTION Care Inc

I the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on September 28, 1993, I SERVED and ENTERED on the civil docket a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) listed below, by depositing said envelope in the U.S. Mail; or by placing said copy(ies) to an inter-office delivery receptacle located in the office of the Clerk.

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Judgment File

Appendix C

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Sacramento, CA 95814

APPENDIX D — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED OCTOBER 22, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civ. S-91-1169 GEB GGH

RONALD L. RENNICK, et al.,

Plaintiffs,

v.

OPTION CARE, INC.,

Defendant.

ORDER AFTER HEARING

After careful consideration of the parties' briefs and oral argument, defendant's motion for summary judgment is DENIED. Plaintiffs raise a genuine issue of material fact regarding whether the parties mutually intended to be bound by the terms negotiated prior to the letter of intent. Plaintiffs' state that they informed defendants they wanted to memorialize the present agreement between the parties with a handshake. This is direct evidence of the mutual intent of the parties which conflicts with defendant's circumstantial evidence that the parties did not manifest an intent to be bound. "If the nonmoving party produces direct evidence of a material fact, the court may not assess the credibility of this evidence nor weigh against it any conflicting evidence presented by the moving party. The nonmoving evidence must be taken as true." *McLaughlin v. Liu*, 849 F.2d

1205, 1209 (9th Cir. 1988), quoting *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987). Therefore the presence of direct evidence disputing the defendants contention that the parties mutually intended to be bound only when a contract was entered, precludes summary judgment.

Defendant's argument that the statute of frauds precludes plaintiffs from enforcing the oral contract must also be rejected, since plaintiffs assert that the letter of intent contained the terms of the oral contract. Although defendant argues that the terms of the letter of intent are inconsistent with the existence of a binding oral contract, the explicit language is not necessarily inconsistent. To find an inconsistency, defendants rely upon inferences. However, inferences, no matter how persuasive, must yield to direct evidence.

Defendant's motion for summary judgment is DENIED.

IT IS SO ORDERED.

DATED: October 23, 1992

s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

Appendix D

United States District Court
for the
Eastern District of California
October 23, 1992

* * CERTIFICATE OF SERVICE * *

2:91-cv-01169

Rennick

v.

OPTION Care Inc

I the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on October 23, 1992, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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APPENDIX E — LETTER OF INTENT DATED JULY 20, 1990

LETTER OF INTENT AMONG
HHC — HOME HEALTH CARE, INC. ("HHC"),
VANTEC VENTURES CORPORATION ("VVC")

AND

O.P.T.I.O.N. CARE, INC. ("OCI")

The purpose of this letter is to acknowledge the respective intentions of HHC, VVC and OCI expressed during a meeting held in Richmond, B.C., on July 3, 1990, and directed toward the creation of a binding interim agreement and other contracts designed to implement various proposed relationships among the parties.

The exact sequence of events required to consummate the arrangements set out hereunder in paragraphs 1 through 10 shall be determined based upon accounting and legal advice to be obtained by the signatories hereto. It is understood accordingly that some aspects of the entire transaction contemplated by this letter may be completed directly between any two of HHC, VVC and OCI, while other aspects may be completed by all three together, as may be to the best advantage of all of the signatories hereto.

It is understood that HHC and VVC shall, in conjunction with the transactions required to establish the relationship set out in paragraphs 1 through 10 hereunder, consummate a share exchange or reverse takeover, whereby HHC will come under the sole direction and control of VVC. It is also understood that references herein to "HHC/VVC" shall pertain to VVC following the aforesaid share exchange or reverse takeover of VVC by HHC.

Appendix E

The contractual arrangements to be formalized pursuant to this letter shall ultimately exist between OCI and HHC/VVC; and the signatories to this letter agree to make and allow such assignments and to take such other actions as may be necessary to achieve this end.

In the context of the above, the signatories to this letter confirm their intent to continue good faith discussions directed toward the creation of formal written contracts that, upon approval by the Boards of Directors of each party, will be executed to establish the following arrangements, and to do such other things as may be required in connection therewith:

1. OCI shall grant to HHC/VVC, without requirement for payment of franchise or other fees and royalties, the exclusive right to the use of the O.P.T.I.O.N. Care® system in Canada, together with the right to use the name "O.P.T.I.O.N. Care (Canada) Inc." or some acceptable variation thereof. This grant by OCI shall include the use of all proprietary and other interests developed by OCI and normally associated with the O.P.T.I.O.N. Care® system, as the same may be improved from time to time. This grant shall also include the provision of support services for the establishment and operation of pharmacies in Canada in accordance with standards normally provided to O.P.T.I.O.N. Care® affiliates in the United States, as the same may be adapted to Canada. In addition, OCI shall provide reasonable assistance to HHC/VVC in seeking reimbursement in Canada. Any assistance provided by OCI which may be extraordinary in nature shall entitle OCI to reimbursement for expenses actually incurred by OCI at cost, it being understood that such costs shall be calculated based upon reasonable charges as internally budgeted by OCI.

Appendix E

2. OCI shall grant to HHC/VVC, without requirement for payment of franchise fees, ten (10) mutually acceptable designated locations in the United States for the establishment of new OCI affiliates, the same to be wholly or partially owned by HHC/VVC. OCI shall not unreasonably refuse to designate any location suggested by HHC/VVC, provided that such location shall meet the minimum criteria normally applicable to O.P.T.I.O.N. Care® affiliates. Such locations shall to the extent possible be designated within geographical regions capable of management on regional bases. Five (5) designated locations shall be identified immediately and five (5) additional locations shall be identified within a reasonable time, it being understood that the said O.P.T.I.O.N. Care® affiliates must be established at such designated locations within thirty (30) months of the time of respective designation. In the event that it becomes apparent that the establishment of an affiliate at any designated location shall be impossible or impractical, then the parties shall designate an alternative therefor.

3. OCI shall provide, at no cost, assistance to HHC/VVC in identifying and communicating with currently operating O.P.T.I.O.N. Care® affiliates for the purpose of facilitating the acquisition by HHC/VVC of interests (in the range of 60 percent or more) in ten (10) such currently operating affiliates. OCI shall provide its consent to such acquisitions with continuation of existing Franchise Agreements.

4. OCI shall provide its consent to the acquisition by HHC/VVC of the Medford and Eugene O.P.T.I.O.N. Care® affiliates with continuation of existing Franchise Agreements.

Appendix E

5. OCI shall consent to the appointment of Mitchell Hoggard and Thomas Vickery as members of the HHC/VVC Board of Directors.

6. HHC/VVC shall be responsible for the provision of adequate capital within a reasonable time to allow for the development of clinics in Canada, subject to the obtaining of reimbursement approvals, and for the start-up of new O.P.T.I.O.N. Care® affiliates in the United States, as well as the acquisition of interests in operating O.P.T.I.O.N. Care® affiliates in that country, as contemplated above.

7. HHC/VVC shall in a timely manner and on a best efforts basis be responsible for implementation and management of the development of the O.P.T.I.O.N. Care® system in Canada, and shall be responsible for the management of the start-up and operation of new clinics in the United States, as well as the acquisition of interests in existing clinics in that country contemplated above.

8. HHC/VVC shall undertake to provide through its officers and directors active participation in the efforts to secure reimbursement approval for home infusion therapy services in Canada and in the efforts to establish pilot projects, joint ventures and other contractual arrangements for the provision of home infusion therapy services in Canada.

9. As consideration for the rights and services to be granted and provided by OCI hereunder, HHC/VVC shall transfer or issue to OCI an amount of HHC/VVC common stock equal to fifteen percent (15%) of all issued and outstanding stock at closing of the agreement contemplated in this letter.

Appendix E

Following the issuance of stock as aforesaid, the issued and outstanding common stock of HHC/VVC shall be as follows:

OCI	-	15%
Rennick Group	-	37%
Current VVC Shareholders	-	48%

10. The closing of the transactions required to establish the relationships set out herein shall be effective July 31, 1990, provided that it is understood that the said closing may be completed in escrow as counsel may advise, with the said effective date.

The undersigned hereby signify their intention to proceed with the development of the relationships set out in paragraphs 1 through 10 herein, and the transactions required to implement those relationships, the same to be ultimately reduced to formal legal documentation. Following the execution and delivery hereof, however, the parties shall firstly execute and deliver an Interim Agreement (pre-transaction agreement) specifying the nature of the transactions required to establish the relationships set out in paragraphs 1 through 10 herein, and setting out the terms and conditions of such transactions. It is understood that the said Interim Agreement shall be subject to Board of Directors approval of each party and completion of satisfactory review of financial and other information in respect of each party on or before August 30, 1990. It is also agreed that the transactions contemplated hereby shall be subject to applicable regulatory approval.

Would you kindly signify your agreement with the terms set out above by execution of a copy of this correspondence and return

of the same. Immediately upon receipt of your acceptance of the terms hereof, we will proceed to make arrangements with counsel for each of the parties for the completion of the Interim Agreement aforesaid and the completion of final formal documentation, with the understanding that this letter of intent is of no binding effect on any party hereto.

ACCEPTED AND AGREED TO THIS 20 DAY OF JULY, A.D. 1990

O.P.T.I.O.N. CARE, INC.

By s/ *Mitchell Hoggard*
Its: *President*

ACCEPTED AND AGREED TO EFFECTIVE THIS 20TH DAY WEEK OF JULY, A.D. 1990

VANTEC VENTURES CORPORATION

By: s/ *W. Sturgeon*
Its: *President*

ACCEPTED AND AGREED TO THIS 20, DAY OF JULY, A.D. 1990

HHC – HOME HEALTH CARE, INC.

By: s/ *R.S. Rennick*
Its: *President*

APPENDIX F — EXCERPTS OF DEPOSITION

DEPOSITION OF THOMAS VICKERY

* * *

[25] Q All right. So Mr. Hays only visited once in two or three years to Chico. And Hoggard I take it was there for, continuing to be in the day-to-day control of the business of Option Care; is that fair?

A Correct.

Q Is it accurate to say you saw him at the time as kind of the primary decision-maker for Option Care?

A Yes.

Q That would be true until he resigned, I take it?

A That's correct.

* * *

[137] Q Did he [Kapoor] represent to the franchisees in Las Vegas on October 5th and 6th that Mr. Hoggard was to continue to maintain the primary direct control of Option Care from a management standpoint?

A I believe he did.

* * *

[156] A It sickened me.

Appendix F

Q Why did it sicken you, Mr. Rennick's report as to what transpired in Chicago?

A Two reasons: First of all, I know the effort that the Rennicks have been making over the past four to five years, at putting together the right effort to join forces in some capacity with Option Care and develop facilities in the United States and in Canada. And I consider him an extremely honorable and forthright human being, and it's —

* * *

[179] Q Have you ever offered an opinion to anyone that the Rennicks were not treated fairly by Option Care or Dr. Kapoor? By the Rennicks I mean the Rennicks, Vantec and Home Health Care, I mean the whole amalgam of Rennicks' interests. Did you ever tell anybody that?

A Probably to Bob Sullivan when I asked him about why they weren't moving ahead, and he told me about their disinterest in dealing with penny stocks. And I said listen, that's not fair.

DEPOSITION OF MITCHELL HOGGARD

* * *

[110] Q Did you sign it on or about the 20th day of July, 1990?

A I would say so.

Q Did you have authority to sign the document, as you understood the situation at the time?

A Yes.

Q Now, did you intend for Option Care to be bound by the materials of this document when you signed it?

A Yes.

* * *

[113] Q To the extent it says Option Care is to do things in this, you agree that Option Care was bound to do it, that's all I care about, what the piece of paper said; is that right?

A Yes.

* * *

[116] Q In what way did the acquisition of the Sutter stock by Kapoor prevent Option Care officials from presenting a contractual relationship to the Option Care board for approval, that is a contractual relationship between Home Health Care, Vantec Ventures and Option Care?

A If memory serves me correct, I don't remember the date, but we signed a letter of intent which — with Option Care and John Kapoor and his company, that set forth that we would not move forward on any issues outside, like the building and developing of things until the transaction was done.

* * *

[120] Q Are you aware of any Option Care official ever conveying Mr. Kapoor's sentiments to either of the Rennicks or

anybody else associated with Home Health Care or Vantec Ventures in that period of time between —

A I don't recall any.

* * *

[128] Q Do you have any recollection of ever telling them that the Kapoor purchase of the Sutter stock would present an impediment to the transaction as set out in the letter of intent between Vantec and Option Care dated July 20th?

A I don't recall telling them that, no.

Q Now, after the Las Vegas conference on October 5th or 6th, you having told them that it was the Option Care intention to go forward with the transaction as set out in the letter of intent between Vantec and Option Care, what, if anything, did any Option Care officials do to effectuate that transaction?

A I believe the reverse takeover was approved, but I don't recall the date.

* * *

[142] Q How — what — strike that. What was you reaction to whatever it was that Rennick told you when he called you to that effect?

A Shock.

Q Why were you shocked?

A Because I assumed they were going to move forward with it.

* * *

DEPOSITION OF RICHARD MATSON

* * *

[137] Q All right. Now, if there was a connection, you understood that, in connection with paragraph number four of the letter of intent, that they were taking actions to transfer the Eugene and Medford franchises to the combined HHC/Vantec, did you at that point say to them, "Don't do it," or anything like that; "The deal's not in place yet"?

A No.

Q Did you express to them, at that point, or make them aware, of what you have now testified you learned sometime prior to the Kapoor purchase of Sutter in October, did you tell them about the concerns that you heard Kapoor had about this transaction?

A I don't believe that I did.

* * *

DEPOSITION OF THOMAS DAVIES

* * *

[111] Q It is accurate to say, then, that you concluded in your role of that company and Hoggard understood that at the very

least this document did create an obligation on O.P.T.I.O.N. Care to move forward with the creation of the documents to set out these transactions?

A Yes.

* * *

[193] Q To implement what had been described there — fair? I mean, it wasn't to be an agreement out of the blue. It was to implement the transaction that is described in Exhibit 4, was it not?

A It was not an agreement to agree. It was an agreement to develop a concept that we could agree to that was actionable.

Q And you've testified, I think that that was your view at the time, and that you expressed that view to Mitch Hoggard?

A I believe I did.

Q Was that also Hoggard's view, as you understood it, at the time?

A Everybody wanted this to work.

* * *

DEPOSITION OF RICHARD S. RENNICK

* * *

[82] Q Would you describe the nature of the agreement that you believed that you had reached in that meeting?

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A The agreement was that we were going to have the use of the Option Care system in Canada, we were going to have the use of the name. Option Care was going to allow us to develop a certain number of clinics or operations, and Option Care was also going to assist us in the United States by granting us franchises in particular areas, and they were going to help us — they were going to facilitate our dealing with current Option Care owners whose operations we could acquire.

Q Anything else?

A That's the basis of it.

Q What you have described, Mr. Rennick, is all of the things that you believed Option Care agreed to do. Correct?

A No; we agreed to do them, too.

Q Okay. Was there anything else that you agreed to do or that Vantec agreed to do?

A Sure. Ron agreed to roll his clinics in. I agreed to take the investment that I had and to have that [83] transferred in, I guess is the way to put it.

Q For the — ?

A The investment that I had in Ron's clinics, the work that had been done in Canada. And Vantec agreed that its board members would actively help us in the promotion of the business, in the acquisition of capital and in trying to get established.

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Q Any other elements of the agreement that you believed you had that come to mind now?

A There might have been, but that was the thrust of it.

Q When you walked out of the meeting after 4:00 o'clock on July 3rd, you had reached agreement on the very points that you had intended to reach agreement on when you walked into the meeting in the morning?

A That's right.

Q In every respect?

A Just about, yes.

Q Can you think of anything that you didn't accomplish that you wanted to accomplish at that meeting?

A Not really. We had the agreement that we came to make.

* * *

[87] Q Was this a formal part of the meeting or was this sort of an aside?

A It would have been on the aside and, in the formal part of the meeting, Mitch also made it very clear that he was the person who was able to make a deal for Option Care.

* * *

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[182] Q Did you say to Mr. Hoggard in words or effect that, "What do you mean you want to go ahead; of course you've got to go ahead. We've got a deal"?

A I didn't have to say that. He was very comfortable. Our communications were very friendly and, "Yes, we're going to go ahead. We're going to do our deal."

* * *

[208] Q And he said the reason for that was that OCI was not permitted to have any material changes during the pendency of the Kapoor transaction.

A Yes.

Q What did you say to him?

A I accepted what he said. We had talked in the meantime and I know that my brother had talked to him in the meantime and he said, "Don't worry. Everything is fine and it will all go ahead." And I believed him.

* * *

DEPOSITION OF RONALD L. RENNICK

* * *

[334] Q Did he use the word partner?

A I believe he used the word partner, yes. But I'm not certain. Capour[sic] shook hands with me, said it was nice to

meet me. And then he said, "Oh, this is Mitch's company and I'm simply here to help Mitch run his company."

Q Did he volunteer that?

A No, he said that. He said that as a statement.

Q Did he say "Hi, I'm Dr. Capour[sic], this is Mitch's company?

A No, we shook hands and he said, whatever, John Capour[sic], I don't know whether he said Dr. Capour[sic]. And that was the statement that he made. "This is Mitch's company and Mitch will run his company. I'm here simply to help Mitch run his company."

Q Was there some question put to him about whether he would run the company?

A I think there was some question put to him at that time about his decision as far as buying or operating franchises or something like that. And he said, "No, I don't have anything to do with running this company."

* * *

DEPOSITION OF KEITH ALEXANDER

* * *

[37] Q What was the end result of the July 3rd meeting?

A At the end of the meeting I volunteered that the way that

we had formalized relationships before getting lawyers involved was to sort of do it on a handshake basis, and that we wanted to feel that the people we were dealing with were as good as their word. And we usually formalized that by a handshake on the deal.

So I proposed that, having spent these previous months and these three or four hours bringing into the best form we could our understandings, that we formalize the deal by a handshake. And my recollection is that Mitch enthusiastically agreed to that and all the principal parties got up and circulated around the room and shook hands with each other on having made the deal. And I recall Mitch saying, Okay, guys, let's make this work.

* * *

DEPOSITION OF WILLIAM STURGEON

* * *

[17] Q Was any agreement reached at that meeting?

A Yes.

Q What was the agreement or what were the agreements that were reached at that meeting?

A The factors that I recall most distinctly were what I refer to as 10, 10 and exclusivity. Option Care would assist us to acquire 10 existing franchises in the U.S. Option Care would grant us franchises for 10 new locations in the U.S. and we would be granted exclusive rights to the Option Care system for Canada.

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* * *

[19] Q Was there to be any further negotiation on any of the terms of the agreement to be papered by the lawyers?

A I had the very clear understanding, David, that Hoggard was in a position to make the deal, and when I left the meeting my impression was the deal had been made when we shook hands and agreed that we had a deal.

Q My question was, was there to be any further negotiation of the terms of the deal in order for the lawyers to paper it?

A No.

* * *

DEPOSITION OF J. R. MacDONALD

* * *

[28] Q Did you reach any agreements at the July 3 meeting?

A Yes.

Q What agreements did you reach?

A I think we reached an agreement. The July 3rd meeting was a culmination of discussions and plans that had been going on for some time, and the basic terms of what we agreed upon are outlined in the letter of intent that was signed later.

* * *

APPENDIX G — PLAINTIFFS' SUPPLEMENTAL RESPONSE TO DEFENDANT'S FIRST SET OF INTERROGATORIES

* * *

[70] *Interrogatory No. 15:*

Identify each of your alleged contracts or agreements with OPTION Care, whether written or oral, and for each: (a) state whether the agreement is oral or is in writing; (b) state all of the terms of your alleged contract or agreement with OPTION Care; and (c) state the basis of your allegations that OPTION Care agreed to each of the terms of each identified contract or agreement.

Supplemental Answer:

The Agreement between the parties was a traditional executory contract; it contemplated future performance on the part of both parties, similar to OPTION Care's franchise agreements which contemplate on ongoing, fluid, maleable [sic] relationship designed to permit the parties to seize opportunities in their mutual interest and to respond to unanticipated exigencies. The Agreement between the parties necessarily was broad in scope, leaving minor details of the relationship open ended.

[71] The agreement between the parties upon which the Plaintiffs rely is evidenced by the entire course of dealings between them from about the late spring of 1990 to the early spring of 1991, without intending to limit the scope of this statement, there were certain meetings and telephone conversations between the parties which may be referred to in particular to substantiate the intentions of the parties and the existence of an agreement. Specifics of many of these are

referred to in file memoranda set out in the documents proceed to the Defendant for inspection, and references to many of the same have been set out in detail elsewhere in the Answers to Interrogatories previously provided by the Plaintiffs.

Some of those certain meetings and telephone conversations between the parties may be summarized as follows:

1. Following the meeting of the parties on July 3rd, 1990 in Richmond, B.C., there were numerous telephone conversations which pertain to the completion of the Letter of Intent executed by the parties. During these conversations the Defendant consistently acknowledged its willingness and intention to proceed with the business relationship agreed upon in Richmond, B.C.

2. During telephone conversations with Rick Rennick on August 1st and 22nd, 1990, and telephone attendances and two personal meetings with Ron Rennick between August 18th and 24th, 1990. Tom Vickery confirmed that the Defendant intended to proceed with the franchise acquisition and development plan agreed to by the Plaintiffs in Richmond, B.C.

[72] 3. During telephone conversations which involved Rick Rennick, Tom Vickery and Tom Davies on September 4th, 5th and 12th, 1990, the Defendant authorized the disclosure of OPTION Care proprietary and confidential information to Andy Dobrodzicki and Vantec for the purpose of allowing them to complete a due diligence review of the franchises in Medford and Eugene, Oregon. Andy Dobrodzicki was not at that time a shareholder or officer of either HHC or Vantec, but intended to become a shareholder and officer of Vantec, and intended to

invest a substantial sum of money in Vantec based upon the agreement between the Defendant and the Plaintiffs.

4. During telephone conversations which involved Rick Rennick, Tom Vickery and Tom Davies on September 18, 27 and 28, 1990, and a telephone conversation between Rick Rennick and Mitch Hoggard on September 25th, 1990, the officers of the Defendant confirmed the Defendant's intention to proceed with the franchise acquisition and expansion agreement with the Plaintiffs, and in particular on September 28th, 1990, Tom Vickery and Tom Davies advised Rick Rennick that they had been instructed by Mitch Hoggard to proceed pursuant to the agreement with the parties. Tom Davies represented that Rick Rennick should report to the Vantec Board, that:

> (a) the Defendant had authorized the release of proprietary and confidential information to Andy Dobrodzicki for his review and due diligence; and
>
> [73] (b) the Defendant's operational people had been assembled to review the agreement with the Plaintiffs; and
>
> (c) the Defendant requested that Andy Dobrodzicki meet with the Defendant's operational people to review the implementation of the agreement between the parties; and
>
> (d) the Defendant wished to institute a structured program pursuant to its agreement with the Plaintiffs.

5. At the Defendant's urging, Ron Rennick and Rick Rennick travelled to the OPTION Care Annual Conference in

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Las Vegas, Nevada, which took place from October 5th to October 7th, 1990. During the conference they had numerous discussions with the Defendant regarding details of the business relationship between the Plaintiffs and the Defendant, including the following:

(a) on the afternoon of October 5, 1990, Rick Rennick and Ron Rennick met with Mitch Hoggard, Tom Vickery, Tom Davies and, for part of the time, Richard Matson, in Mitch Hoggard's suite in the Flamingo Hilton Hotel. Rick Rennick provided copies of documentation pertaining to the reverse takeover of Vantec and advised that the Plaintiffs intended to proceed with the reverse takeover based upon the Defendant's intention and the agreement between the parties made in Richmond B.C. Mitch [74] Hoggard stated that the Defendant would honor its agreement with the Plaintiffs. Mitch Hoggard requested that Rick Rennick provide an outline of the Vantec Board so that he could provide such information to John Kapoor; and

(b) at several times on October 5th and 6th, 1990, Mitch Hoggard and Tom Vickery had other conversations with Ron Rennick and Rick Rennick which confirmed the Defendant's intention to proceed with its agreement with the Plaintiffs, and in particular, on the evening of October 6, 1990, Mitch Hoggard on several occasions stated to Rick Rennick and Pauline Rennick "we're going to do it, buddy," and similar words to that effect; and

(c) on October 6, 1990, Richard LeClaire met with Rick Rennick and Ron Rennick, at which time the

Plaintiffs' plans were discussed in detail, including the proposed acquisition of existing OPTION Care franchised businesses and the development of new franchise territories in coordination with the Defendant; and

(d) on October 7, 1990, Rick Rennick met with Tom Davies at the Flamingo Hilton Hotel and reviewed the terms of the Share Exchange Agreement among the Plaintiffs, after which they discussed other aspects of the agreement between the parties.

[75] 6. Prior to the execution of the Share Exchange Agreement among the Plaintiffs on October 9, 1990, Rick Rennick had three telephone conversations with Tom Vickery and one with Lee Potts; and Keith Alexander, a Vantec Director, had a telephone communication with Tom Vickery. During these conversations Tom Vickery confirmed to Rick Rennick and Keith Alexander that the Defendant's [sic] intended to proceed with its agreement with the Plaintiffs.

7. On October 10, 1990, Bill Sturgeon, a Vantec Director, had a telephone conversation with Tom Vickery, during which Tom Vickery confirmed that the Defendant intended to proceed with its agreement with the Plaintiffs.

8. On October 11th, 18th and 26th, 1990, Rick Rennick had telephone communications with Tom Vickery regarding the agreement between the parties and in particular regarding the Consent to Transfer the Oregon Franchises to HHC for the purpose of the HHC/Vantec Share Exchange Agreement, and regarding the arrangements for the attendance of Andy Dobrodzicki, Rick Rennick and Ron Rennick in Chico,

California on November 5, 1990 to meet the Defendant's "operational people."

9. On November 5, 1990, Ron Rennick, Rick Rennick and Andy Dobrodzicki attended in Chico, California at the request of the Defendant and met with officers, directors and employees of the Defendant in relation to numerous matters. At the request of the Defendant, Andy Dobrodzicki briefed the "operation people" in relation to the development plans of the Plaintiffs. Andy [76] Dobrodzicki also presented a lengthy written Canadian Development Plan.

On November 5, 1990, in response to a specific request by Rick Rennick for a summary of the Defendant's understanding of its agreement Tom Vickery stated that the relationship between the parties would proceed as previously discussed and agreed that the Plaintiffs should proceed to close the transaction contemplated in the Share Exchange Agreement. He further stated that the Defendant would propose details of the way in which the Defendant would acquire an interest in Vantec, a joint development of a pilot project in Canada and a coordinated approach to development of operations in Canada and acquisitions and development of new franchise territories in the United States. Tom Vickery also instructed Richard Matson to set out some alternative ways in which the Defendant could hold an equity interest in Vantec.

10. At the end of the business day on November 5, 1990, Ron Rennick and Rick Rennick met with Mitch Hoggard in his office and discussed a number of matters including the progress being made toward the consummation of the Share Exchange Agreement among the Plaintiffs, the activity in the Vantec stock since July 1990, the Defendant's desire that Vantec allow for the

acquisition of its stock by key OPTION Care officers and employees, and other matters. Rick Rennick assured Mitch Hoggard that the Vantec Board had committed to provide an opportunity for OPTION Care officers and employees to participate in Vantec stock ownership. Shortly thereafter Rick Rennick, Ron Rennick and Andy Dobrodzicki met [77] with Mitch Hoggard and Tom Vickery in the Board Room of the Defendant's offices at Chico and review the Plaintiffs' development plans and the relationship between the parties. Mitch Hoggard confirmed that the Defendant would proceed with the franchise acquisition and development program with the Plaintiffs and he stated that it would make sense for Vantec to be involved in the initial public offering which was being considered for the Defendant. Rick Rennick reviewed with Mitch Hoggard and Tom Vickery a way in which Vantec could acquire numerous OPTION Care operations in the United States and vend the same into the Defendant in conjunction with its public offering, and Rick Rennick outlined how this could also include the Canadian development interests of Vantec. In response to a specific inquiry, Mitch Hoggard stated that John Kapoor would co-operate with the plans of the Plaintiffs, and that he had agreed to allow Mitch Hoggard to conclude the details of his business development plans, including the arrangement with the Plaintiffs.

11. On November 6th, 12th, 14th, 23rd, 25th and 28th, and on December 5th, 6th, 10th, 11th, 13th, 17th, 18th and 21st, 1990, Rick Rennick and Andy Dobrodzicki variously had telephone communications with Tom Vickery, Mitch Hoggard, Tom Davies and Richard Matson, during which a broad range of topics were discussed, including but not limited to the identification of franchised businesses which could be acquired by HHC/Vantec, the mechanics of equity participation of the Defendant in Vantec,

progress of the Share Exchange Agreement among the Plaintiffs, transfer of the Oregon franchises to HHC/Vantec, banking arrangements for said franchised businesses, the development of the Vantec stock in the market and the availability of share options in Vantec.

12. On November 8, 1990, Richard LeClaire had a lengthly [sic] discussion with Andy Dobrodzicki regarding franchises that would be possible acquisitions for the Plaintiffs; and on November 15, 1990 Richard LeClaire introduced the Plaintiffs to the owner of the OPTION Care franchised business in Boise, Idaho as a potential for acquisition and in furtherance of the agreement between the Plaintiffs and the Defendant.

13. In November, 1990 Andy Dobrodzicki forwarded to the Defendant for review a copy of a comprehensive development Plan for introducing the OPTION Care home I.V. system in Alberta. The plan was reviewed by the Defendant and, during November, 1990 Tom Vickery telephoned Rick Rennick to state that he had reviewed the plan found it acceptable, but requested confirmation of the manner in which the Defendant would be reimbursed.

14. On January 4, 1991, Ron Rennick had a telephone discussion with Mitch Hoggard regarding the Defendant's plans in the Pacific Northwest of the United States, and on January 23, 1991, Rick Rennick had a telephone discussion with Mitch Hoggard regarding this matter and the Defendant's broader development plans, as well as the furtherance of the agreement between the Plaintiffs and the Defendant and the coordination of efforts between them.

[78] 15. On February 25th and 28th, 1991, Rick Rennick

had telephone discussions with Tom Vickery and on February 28 and March 15, 1991, Rick Rennick had telephone discussions with Mitch Hoggard regarding the changes in the Defendant's management, during which telephone discussions Tom Vickery and Mitch Hoggard stated that they believed that the Defendant would proceed with the business relationship with the Plaintiffs as had been contemplated by the parties. At or about the same time Ron Rennick had telephone discussions with Mitch Hoggard and Tom Vickery during which Mitch Hoggard and Tom Vickery made similar statements.

* * *